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Supreme Court, U.S.
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No. 01-7662

In The
Supreme Court of The United States

THOMAS JOE MILLER-EL,
Petitioner,

v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under *Batson's* third step, is a state judge required to apply a shifting degree of scrutiny dependant on the strength of the *prima facie* showing to determine whether a prosecutor's peremptory strikes are credible?

2. On state habeas review, is a court's competency determination based on supplemental briefing, expert affidavit testimony, and personal recollection from trial unreasonable under 28 U.S.C. § 2254(d)(2) because it did not hold a "live" hearing?

3. Under 28 U.S.C. §§ 2254(d)(2) & (e)(1), is it logically consistent for a state court factual determination to be unreasonable when the sole fact at issue is correct?

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PRELIMINARY STATEMENT

Thomas Joe Miller-El is a Texas death-sentenced inmate seeking a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit denying Miller-El habeas relief. Miller-El is scheduled to be executed on February 21, 2002. In his petition for certiorari, Miller-El presents four questions that essentially relate to two distinct underlying constitutional claims—(1) a *Batson*[1] challenge and (2) a disputed competency determination. On a procedural level, Miller-El also challenges the Fifth Circuit Court of Appeals' treatment of 28 U.S.C. §§ 2254(d)(2) & (e)(1) as it relates to both of his substantive claims.

Regarding the *Batson* claim, Miller-El complains that the trial court did not give enough weight to his prima facie evidence when making its credibility determination at *Batson's* third step. Specifically, Miller-El alleges that *Batson's* third step requires a trial court to measure a prosecution's credibility using a sliding scale that changes dependent on the relative strength of the prima facie showing of step one. *See* Pet. for Cert. at 25 ("The strength of the *prima facie* case helps determine the level of scrutiny to be applied to the proffered race-neutral reasons. Thus, an actor who stands indicted by a particularly formidable *prima facie* case will face greater scrutiny during the third, determinative stage, at which a court will weigh the totality of the evidence."). Notwithstanding Miller-El's normative argument, certiorari must be denied on this claim because neither *Batson*, nor any other controlling precedent, imposes any kind of scaled scrutiny to be applied at *Batson's*

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[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

third step.

Regarding Miller-El's underlying competency claim, Miller-El alleges that the state habeas court utilized an unreasonable process to determine that Miller-El was competent at the time of his trial. Certiorari must be denied on this claim because the record plainly speaks for itself regarding the reasonableness of the state habeas court's review, as well as the reasonableness of every reviewing court since.

Regarding the Fifth Circuit's application of 28 U.S.C. §§ 2254(d)(2) & (e)(1), the court below held that Miller-El failed to present clear and convincing evidence to establish that the state court decision was unreasonable. This construction was not only proper in this case, but logically mandated, since there was only one question of fact at issue in each underlying substantive claim. It is not possible for a fact to be correct, yet unreasonable.

STATEMENT OF THE CASE

I. Facts of the Crime.

Miller-El's wife, who was an employee at the Holiday Inn South in Irving, Texas arranged for a meeting of the Moorish Science Temple Feast at the hotel on November 8-10, 1985, that Miller-El attended as a participant. Miller-El, his wife, and an accomplice returned to the hotel shortly before midnight on November 15 on the pretense of picking up his wife's paycheck. While there, Miller-El, who was armed with a semi-automatic "tech" nine millimeter machine gun with a flash suppressor for night use; and his accomplice, who was also armed, forced a hotel employee Donald Hall to empty the cash drawer and then

ordered Hall to bring any other people from the back to the front. Doug Walker, another employee, then came out, and the two employees were led to a bellman's closet and forced to open it. Once Miller-El and his accomplice removed all of the valuables from the closet and took Walker's and Hall's wallets, Miller-El tied Walker's hands behind his back, tied his legs together, and gagged him with strips of fabric. The accomplice did the same to Hall. Walker was laid on his face and Hall was laid on his side. Miller-El then stood at Walker's feet, removed his glasses and then shot Walker in the back two times. Hall closed his eyes after the first shot. He heard two more shots and realized that he had also been wounded. Hall tried to talk to Walker but only heard him choking. When he heard familiar voices outside, Hall screamed for help.

Miller-El fled to Houston, where authorities were advised that Miller-El was wanted on a murder warrant in Irving. Based on that information, Houston authorities went to the residence of Miller-El's Houston acquaintance to arrest Miller-El. While there, Miller-El and his acquaintance arrived in a car and noticed approaching law officers. In his attempt to escape, Miller-El was shot by an officer when he jumped from the vehicle brandishing a gun.

II. Facts Relating to the Issues Presented for Review.[2]

A. The *Batson* Issue.

Jury selection for Miller-El's capital murder trial began on February 3, 1986 and

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[2] This section is drafted liberally from the detailed Findings and Recommendations of the United States Magistrate Judge, pp. 6-9.

continued through March 5, 1986. The original venire consisted of 108 prospective jurors, including eighteen African-Americans. Six of the African-American jurors were excused by agreement of the parties and one was struck for cause. Both sides were then allowed fifteen peremptory challenges. The prosecution used ten strikes against African-Americans. The defense exercised all fifteen of its challenges against non-minorities. One African-American was seated on the jury.

On March 9, 1986—just four days after the jury was empaneled—The *Dallas Morning News* ran a front-page story about jury selection practices in Dallas County criminal cases. *See* Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, March 9, 1986 at A1. This article prompted defense counsel to file a motion to quash the jury panel. The trial court held a hearing on the motion on March 12, 1986. Testifying at the hearing were five current or former judges, two prosecutors, and two defense lawyers, who testified regarding historic discriminatory practices dating from the 1950s.

At the conclusion of the hearing, the trial judge found that there was no evidence presented that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office and that Miller-El had failed to establish a *Swain*[3] violation. The case proceeded to trial and Miller-El was convicted of capital murder on March 26, 1986. One month later, the Supreme Court decided *Batson*.

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[3] *Swain v. Alabama*, 380 U.S. 202 (1965).

On direct appeal, Miller-El challenged his jury selection under the *Batson* standard. The Texas Court of Criminal Appeals found that Miller-El had established a prima facie claim under *Batson's* first step based on the disproportional number of blacks that were stricken at voir dire. *Miller-El v. State*, 748 S.W.2d 459, 460 (Tex. Crim. App. 1988). The case was remanded to the trial court with instructions to conduct a *Batson* hearing. *Id.* at 460-61.

On remand, the *Batson* hearing was held on May 10, 1988. Paul Macaluso, the prosecutor who conducted voir dire, testified as to his reasons for striking each of the *Batson* jurors from the jury panel. The trial court determined that these explanations were race-neutral and negated any inference of purposeful discrimination. Specifically, the court found that: (1) none of the explanations given by the prosecutor were based on group traits; (2) none of the jurors were questioned perfunctorily; (3) there was no disparate examination of the jurors; and (4) the primary reason given to support each peremptory challenge, the juror's reluctance to assess the death penalty, was closely and directly related to the facts of the case.

Miller-El challenged these findings on direct appeal. The Texas Court of Criminal Appeals, after independently reviewing the voir dire and the supplemental record, found that the record contained "ample support" for the prosecutor's racially neutral reasons and concluded that the prosecutor's explanations were not "patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law." *Miller-El v. State*, No.

69,677, slip op. at 2 (Tex. Crim. App. September 16, 1992).

B. The state habeas competency determination.

Despite raising thirty-six points of error on direct appeal, it was not until nearly nine years after his trial, in his state habeas application, that Miller-El first raised his claim that he was mentally incompetent to stand trial due to his physical injuries.

Miller-El's trial was held eight weeks after he was shot by Houston police officers incident to his arrest. Miller-El sustained serious abdominal injuries and was taken to the hospital for treatment. Surgeons removed part of his intestines, repaired damage to his internal organs, and performed a double-barreled colostomy. He was hospitalized for eight weeks and was eventually discharged to the custody of Harris County officials on January 12, 1986. Four days later, Miller-El arrived at the Dallas County Jail. Miller-El continued his treatment with a variety of medications and was placed on a double portion diet to regain weight. A wheelchair was ordered so he could go to court, however, Miller-El no longer needed a wheelchair by the time jury selection began on February 3, 1986.

On three separate occasions during his trial, Miller-El underwent medical evaluations at the direction of the trial court. First, during jury selection, Miller-El experienced chest pain, chills, and fever, prompting the judge to order a medical evaluation. Miller-El was diagnosed with pneumonia, treated with Darvocet and Erythromycin, and discharged the same day. Nine days later, while jury selection was still on-going, after Miller-El reported delays in the receipt of his medication, "the trial judge asked the jail doctor to determine

whether petitioner needed more pain medication for his 'well-being.'" The jail doctor determined that he did not. *See* Findings and Recommendations of the United States Magistrate Judge, p. 29. Then, two days before jury selection concluded, Miller-El was taken to the hospital for treatment of a chest abscess. Once his trial began, Miller-El complained about soreness around his rib cage and asked to see a doctor, which is noted on his medical chart. Finally, on the evening of the day Miller-El was found guilty in the first phase of his trial, the trial judge ordered a medical evaluation to determine whether Miller-El was able to sit through court after Miller-El complained about nausea and a problem with his colostomy bag. Findings, p. 32. Miller-El was kept overnight at the hospital for treatment for a small bowel obstruction. The next day, he was released from the hospital and the punishment phase of his trial began.

ARGUMENT

I. The Questions Presented For Review Are Unworthy of The Court's Attention.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are compelling reasons therefor. Miller-El advances no compelling reason in this case and none exists. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this court's exercise of its certiorari jurisdiction. To the extent that Miller-El attempts to add a shifting scrutiny requirement to *Batson's* third step, he is barred under

Teague v. Lane, 489 U.S. 288 (1989).

As a threshold matter, AEDPA's standard of review applies to Miller-El's petition. Under AEDPA, a federal court may grant habeas relief only if the state court proceedings

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) & (2).

Section 2254(d) distinguishes between two types of erroneous decisions–those of law and those of fact. Claims of factual error are subject to the standard enunciated in section 2254(d)(2). State court findings of fact are presumed correct and may be overturned only if shown to be incorrect by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Both of the underlying substantive issues Miller-El challenges here involve outcome-determinative findings of fact.

II. The Trial Court's Credibility Determination That *Batson* Was Not Violated is Supported By The Record And Is Thus Not Clearly Erroneous; As Such, It is Reasonable and Entitled to Deference.

Miller-El claims that the State exercised its peremptory challenges during jury selection in a racially discriminatory fashion in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Specifically, Miller-El complains that the trial court did not give enough weight to his *prima facie* evidence when assessing whether the prosecution's peremptory justifications were credible. But, because probative evidence supports the trial court's

detailed conclusions that the prosecutor's strikes were credible, they cannot be found to be clearly erroneous, nor can they be found to be unreasonable, and as such, they are entitled to deference by this Court.

Batson sets forth a three-step evidentiary framework for evaluating claims of racial discrimination in jury selection. *See id.* at 93-98. First, the defendant must make out a *prima facie* case that the prosecutor has exercised peremptory challenges in a racially discriminatory manner. *See id.* at 96-97. Second, if the defendant has made a *prima facie* showing, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 97. "[T]he prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges." *Id.* at 98 n. 20. Yet the explanation "need not rise to the level justifying exercise of a challenge for cause." *Id.* at 97. In fact, "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 768. Third, if the prosecutor has articulated "a neutral explanation related to the particular case to be tried," the trial court then has "the duty to determine if the defendant has established purposeful discrimination." *Batson*, 476 U.S. at 98. The defendant at all times bears the ultimate burden of persuasion as to the existence of purposeful discrimination. *Purkett*, 514 U.S. at 768.

A. The trial court properly applied *Batson's* third step.

In this case, there is no dispute that Miller-El presented a *prima facie* claim under *Batson's* first step. Nor is there a dispute that the prosecution presented facially neutral reasons to justify each peremptory strike. Solely at issue is Miller-El's disagreement with the trial court's ultimate determination at *Batson's* third step, finding that the prosecution's reasons were credible and that *Batson* was not violated.

A state court finding under step three of *Batson* is a determination of fact. *See Hernandez v. New York*, 500 U.S. 352, 365-66 (1991). On review, the state court's finding is presumed correct unless Miller-El rebuts that presumption with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). "[W]here there are two permissible views of the evidence, the factfinder's choice between them cannot by clearly erroneous." *Hernandez*, 500 U.S. at 369. In reviewing a state trial court's finding on the issue of discriminatory intent, federal courts should not conduct "independent appellate review," and must "accord[] great deference . . ." to the state findings. *Hernandez*, 500 U.S. at 364. As *Hernandez* makes clear,

> [W]e decline to overturn the state trial court's finding on the issue of discriminatory intent unless convinced that its determination was clearly erroneous. It "would pervert the concept of federalism," to conduct a more searching review of findings made in state trial court than we conduct with respect to federal district court findings.

Id. at 369 (internal citations omitted).

The record abundantly supports the reasonableness and correctness of the trial court's determination as evidenced throughout Miller-El's state court proceedings, including voir dire, the post-voir dire *Swain* hearing, the *Batson* hearing on remand, and the direct appeal opinion. First, even though *Batson* had not been decided at the time of voir dire, the prosecution offered explanations on the record immediately following each peremptory strike. The fact that these reasons were given immediately following each juror's voir dire adds credibility to the trial court's ultimate determination since the trial court was able to immediately assess first-hand the genuineness and sincerity of the prosecution's peremptory strikes in light of the immediately preceding voir dire, particularly the demeanor of the potential jurors and the attorneys for both sides. The fact that *Batson* had not yet been decided is significant and supports the prosecution's credibility because the prosecution's stated reasons obviously were not offered as a pretextual way to circumvent *Batson's* dictates.

Second, despite finding no *Swain* violation following the trial court's extensive post-voir dire hearing, the trial court held a *Batson* hearing upon remand from the Court of Criminal Appeals to give effect to the change in the evidentiary formulations from *Swain* to *Batson*.[4] There, the trial court went through each successive *Batson* step, following existing Supreme Court directive to the letter. After the hearing, the trial court issued

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[4] A transcript of the entire *Batson* remand hearing is attached as Appendix A. It is evident from the transcript that the trial court conscientiously applied each step of *Batson* and considered all of the evidence presented in making its ultimate determination.

findings of fact detailing its conclusions. The detailed, written factual findings of the trial court demonstrate that each challenged black juror was stricken on race-neutral grounds. The trial court found:

> At the time of the trial in this case, this court was convinced that none of the State's peremptory challenges were made for race-related reasons. The court remains convinced that this is true, and holds that the evidence did not even raise an inference of racial motivation in the use of the State's peremptory challenges. While it is true that the State used 10 of its 14 peremptory challenges against black veniremen, it is also true that one black venireman did serve on the jury. However, such raw numbers, while instructive, are not the sole basis for this court's holding. . . .
>
> . . . .
>
> . . . [T]he Court makes the following Findings of Fact and Conclusions of Law:
>
> 1. The Court finds that the prosecutor came forward with a neutral explanation for each of the State's peremptory challenges of a venireman of the Defendant's race.
>
> 2. The Court finds that the explanations given by the prosecutor in each case were completely credible.
>
> 3. The Court finds that the explanations given by the prosecutor as to each venireman were completely sufficient as to content.
>
> 4. The Court finds that none of the explanations given by the prosecutor were based on a group trait which was not given to apply to the challenged veniremen specifically.
>
> 5. The Court finds that none of the veniremen in question were examined only perfunctorily by the prosecutors.
>
> 6. The Court finds that no disparate prosecutorial examination of any of the veniremen in question has been shown.

> 7. The Court finds that the primary reasons for the exercise of the challenges against each of the veniremen in question, their reluctance to assess or reservations concerning the imposition of the death penalty, were closely and directly related to the facts of the case, insofar as this was a death penalty case.
>
> 8. The Court finds the other factors cited by the prosecutors were reasonably related to the facts of the case.
>
> 9. The Court finds that there has been no showing by the Defendant of disparate treatment by the prosecutor of the black veniremen in question versus non-black veniremen, where there was a difference between the responses given by veniremen who were and who were not challenged by the State.
>
> 10. The Court finds that there was no purposeful discrimination by the prosecutor in the use of his peremptory strikes.

1 Supp. Tr. 4-7.

Miller-El fails to present clear and convincing evidence to the contrary, and this Court should deny certiorari review.

B. *Batson* does not require the trial court to apply different levels of scrutiny in step three when considering the prosecutor's peremptory strike justifications.

Miller-El alleges that step three requires a trial court to apply shifting levels of scrutiny when making its credibility determination. Specifically, he argues, "The strength of the *prima facie* case helps determine the level of scrutiny to be applied to the proffered race-neutral reasons. Thus, an actor who stands indicted by a particularly formidable *prima facie* case will face greater scrutiny during the third, determinative stage, at which a court will weigh the totality of the evidence." Pet. for Cert. at 25. To the contrary, Supreme Court law requires nothing of the kind. To that extent, Miller-El's extension of *Batson* is barred

by *Teague v. Lane*, 489 U.S. 288.

As Chief Judge Becker of the Third Circuit Court of Appeals recently noted in a case discussing *Batson's* third step:

> [S]tep three is neither conceptually difficult nor procedurally complicated. Step three simply requires the judge to make a finding of fact—"to determine if the defendant has established purposeful discrimination," *Batson*, 476 U.S. at 98 (footnote omitted). See also *Purkett*, 514 U.S. at 767; *Hernandez*, 500 U.S. at 358-59 (plurality opinion); *id.* at 375 (O'Connor, J., concurring in judgment). Neither Batson nor any subsequent Supreme Court or Third Circuit case has added to this requirement.

Riley v. Taylor, ___ F.3d ___, 2001 WL 1661489 at *49 (3rd Cir. Dec. 28, 2001) (Becker, C.J., concurring in the judgment, but disagreeing with majority *Batson* holding).

In *Riley*, as Miller-El does here, the majority took issue with the fact that the trial court did not comment on the record regarding evidence that on review seemingly undermined the prosecution's proffered explanations for the disputed peremptory strikes. *See id.* at *15-23. The court there held that because the state court did not discuss on the record the evidence that the defense offered to rebut the prosecution's race-neutral peremptories, and because there was nothing else relevant in the record to support the state courts' decision finding the prosecution's explanations credible, Riley was entitled to *Batson* relief. The *Riley* court essentially imposed a "totality of the circumstances" weighing requirement at step three that specifically must be documented on the record.

Without agreeing with the majority conclusion, *Riley* is distinguishable from Miller-El's case for several reasons. First, and importantly, *Riley* was decided under the pre-

AEDPA standard of review. *Id.* at *17. Second, unlike Riley's rebuttal evidence, Miller-El's *prima facie* evidence does little to detract from the State's peremptory justifications that are abundantly documented in the record. Instead, his *prima facie* case consists primarily of historic data—compiled by newspaper reporters—dating back to the 1950's that, while useful in a *Swain* context, utterly fail to negate the prosecution's peremptories in his particular case. As the federal magistrate noted, "Historical evidence is of limited value in assessing whether the race-neutral explanations articulated by the prosecutor were a pretext for discrimination *in this case*." Findings and Recommendation at 13. His other *prima facie* evidence consists of patchwork veniremember comparisons using snippets of voir dire testimony[5], minimum-punishment voir dire testimony used by both the prosecution and the defense, and permissible jury shuffles, none of which formed the actual bases of, or serve to negate the prosecutions strikes, but merely serve as discriminatory innuendo in establishing his *prima facie* claim. Third, the prosecution's race-neutral justifications here are more detailed and explanative than those in *Riley*; hence, more credible.

As Chief Judge Becker noted in *Riley* that is entirely applicable here:

> I do not question that a judge, in making the factual finding required by step three of Batson, should consider all of the relevant evidence that has been adduced. But neither Batson nor any later Supreme Court . . . case suggests that a federal habeas court is free to reject the factual findings of a state court if the state court does not comment on all of the evidence or provide what the federal court regards as a satisfactory explanation for its finding. . . .

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[5] *See* Appendix B (discussing individual voir dire of each *Batson* veniremember and the prosecution's reasons for striking them in the context of Miller-El's challenges.)

. . . .

> . . . The majority confuses the obligation to consider all of the relevant evidence (something that a court should always do in making findings of fact) with the obligation to comment on all of the evidence (an obligation that we are not free to impose on state courts).
>
> In this case, as I have noted, there is no question that the state courts did precisely what step three of Batson required—they made findings as to whether Riley had established purposeful discrimination. And they did so only after discovery and a thorough hearing. There is no reason to believe that the state courts did not consider all of the relevant evidence, including all of the evidence that the majority now finds persuasive.

Riley, 2001 WL 1661489 at *50 (footnotes omitted).

Miller-El takes the majority holding in *Riley* a step further by not only requiring the state judge to consider the totality of the circumstances on the record, but further requiring the state judge to apply specific measures of scrutiny based on the *prima facie* claim in making its credibility determination. As Chief Judge Becker in *Riley* made clear, this is not the law, nor should it be.

The cases Miller-El cites either do not support his proposition or are non-controlling.[6] For example, Miller-El relies on a statement this Court made in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), an age discrimination case that

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[6] Miller-El cites to other non-controlling cases that don't particularly support his position, or that use different standards of review, whether federal, pre-AEDPA, or both. *See e.g., Coulter v. Gilmore*, 155 F.3d 912 (7th Cir. 1998) (pre-AEDPA case holding trial court must consider relevant circumstances); *U.S. v. Alvarado*, 951 F.2d 22 (2nd Cir. 1991) (non-habeas, federal case stating that judicial officer is *entitled* to assess race-neutral explanation in light of all relevant evidence, but ultimately deferred to factfinder because credibility finding of no discriminatory intent was supportable); *U.S. v. Hill*, 146 F.3d 337 (6th Cir. 1998) (non-habeas, federal case requiring a finding of clear error to reverse, but remanding for a detailed explanation under step three).

applied a Title VII test somewhat similar to the *Batson* formulation. There, a jury found age discrimination despite a weak *prima facie* showing and a relatively strong rebuttal by the employer-defendant. On the defendant's motion for judgment notwithstanding the verdict, the trial court upheld the jury's credibility determination and denied the motion. On appeal, the Court of Appeals overrode the credibility determination of the jury and trial court and reversed, rendering judgment for the employer. This Court reversed. And while this Court held that the trier of fact *may* consider evidence and inferences drawn from the *prima facie* case in considering the employer's non-discriminatory explanations, *id.* at 143, the emphasis was not on the relative strengths of the competing positions, but rather, on the credibility determinations of the factfinder. *Id.* at 150. This Court's ultimate conclusion that "the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's" parallels the Director's position here. A federal reviewing court under 28 U.S.C. § 2254(d)(2) may not substitute its judgment concerning the weight of the evidence for the state courts' credibility determination when the evidence supports the finding. *Hernandez*, 500 U.S. at 369.

As a practical matter, requiring a trial court to apply different levels of scrutiny dependant on the strength of the *prima facie* claim in making its credibility determination improperly penalizes those defendants who do not have the advantage of historic discrimination to pad their *prima facie* claim. For example, assume a prosecutor discriminated in fact, and the defendant was only able to demonstrate factors in his case

alone to support a *prima facie* claim. Applying Miller-El's shifting scrutiny test, the trial court would be required to factor in the relative weakness of the *prima facie* showing to its determination of whether the prosecutor's facially-neutral, but discriminatory, reasons were credible. Whereas, in an otherwise identical case where there was evidence tending to demonstrate historical discrimination that effectively added weight to the *prima facie* claim, under Miller-El's evidentiary formulation, the trial court would be required to factor in the relatively stronger *prima facie* showing to its ultimate credibility determination. These variable levels of scrutiny could lead to disparate results, in spite of the identical discriminatory intent of the prosecutor. This untenable formulation impermissibly detracts from the ability of the trial court to make its own independent credibility determination based on its personal observation, and its ability to consider facial expressions, gestures, vocal inflection, and attitude. Additionally, it is contrary to the law. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985) ("[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."). As this Court stated in *Hernandez*:

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercised the challenge. . . . [E]valuation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Hernandez, 500 U.S. at 353.

Miller-El's shifting scrutiny formulation is not the law and Miller-El cites to no controlling authority to support his interpretation of *Batson*. As such, this claim is entirely *Teague* barred and this Court should deny certiorari review.

C. The federal courts below properly applied 28 U.S.C. § 2254 to deny Miller-El relief.

After conducting a *de novo* review, the district court below, citing *Hernandez*, denied Miller-El's *Batson* challenge, deferring to the experience of the trial court judge, and in particular, his unique position of being able to evaluate the demeanor of the parties at the time of trial. The court properly applied 28 U.S.C. § 2254 by independently ensuring that the record supports the trial court's findings. The magistrate's findings reflect that the court conducted a thorough, meticulous review of the record.

The Fifth Circuit also conducted an independent review of the findings of the state court and of the evidence presented by Miller-El in his application. They, too, found that the record fully supported the trial court's determination that there was no disparate questioning of the *Batson* jurors and that the prosecution's reasons for striking the jurors was due to their reluctance to assess and/or their reservations concerning the death penalty. It held that Miller-El had failed to establish clear and convincing evidence to the contrary; and denied relief.

In light of the detailed, independent review undertaken by every court throughout Miller-El's appellate process on this claim, this Court should not grant certiorari.

III. The State Habeas Court's Factual Finding That Miller-El Was Mentally-Competent to Stand Trial Is Supported By The Record And Is Thus Reasonable, And The Court Below Properly Found That Habeas Relief is not Warranted.

Miller-El's competency claims failed in the courts below because Miller-El could not link his unquestionable physical discomfort with the test for *mental* incompetency as outlined in *Dusky v. United States*, 362 U.S. 402 (1960). Applying the standard of 28 U.S.C. § 2254, the courts below found that the state court determination was reasonable and not clearly erroneous. Here, Miller-El complains that the state habeas court used an unreasonable process to determine that Miller-El was competent in fact. But, the state court's process and its ultimate determination were neither unreasonable, nor erroneous, and as such are entitled to deference.

A. The record reflects that Miller-El was competent in fact at the time of his trial.

The conviction of a mentally-incompetent accused person is a violation of due process. *See Drope v. Missouri*, 420 U.S. 162, 172 (1975). Due process requires that a hearing be held whenever evidence raises a sufficient doubt about the mental competency of an accused to stand trial. *See id.*, 420 U.S. at 180. The test for determining a defendant's mental competency is "whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceeding against him." *Dusky*, 362 U.S. at 402.

Miller-El did not challenge his competency to stand trial at the time of his trial or on direct appeal. It was not until Miller-El's state habeas appeal, nine years after his trial and conviction, that the allegation of mental incompetency was raised for the first time. At trial, there was no suggestion or indication that Miller-El was mentally incompetent to stand trial. Indeed, Miller-El's attorney and the trial court both made statements during the trial completely to the contrary. For instance, after the State concluded its case-in-chief, the trial court inquired as to whether Miller-El desired to testify on his own behalf. 3 SR 1195. Significantly, after questioning by the court and its finding that Miller-El knowingly and intelligently waived his right to testify, 3 SR 1195-97, the following exchange occurred:

> THE COURT: . . . Mr. Cunningham and Mr. West [attorneys for Miller-El], it might be a bit late to ask this question, but I've seen no evidence that the Defendant is not competent to either stand trial or make these decisions on his own behalf.
>
> MR. CUNNINGHAM: Your Honor, to the best of my knowledge, Mr. Miller-El is competent and is aware of the facts and knows what is going on. Is that true, Mr. Miller-El?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Well, I'll note for the record that throughout the trial including voir dire that this Defendant appeared, from the bench, to participate actively with his lawyers in jury selection decisions and also during the trial as regards cross-examination of witnesses and such as that. Having heard nothing else, I'm going to find that he makes his decision competently and I, of course will honor it.

3 SR 1197-98.

This exchange went unchallenged. The failure of defense counsel to raise the issue of competency at trial is persuasive evidence that Miller-El was indeed competent. *Reese v. Wainwright*, 600 F.2d 1085, 1092 (5th Cir. 1979). That the trial court's factual findings regarding Miller-El's competency to stand trial were made on the record and not reduced to writing, is of no constitutional significance. *Wainwright v. Witt*, 469 U.S. 412, 430 (1985).

B. The state habeas court's review process was reasonable.

The evidence also supports the reasonableness of the state habeas court's review process. When Miller-El first raised the competency issue in his state habeas appeal, the court ordered supplemental briefing on the matter that the parties submitted with expert affidavit testimony attached. Before making its competency determination, the state habeas court had before it for consideration: the complete trial record, supplemental briefing by both parties, expert affidavits by both parties, and its personal recollection—having been the sitting judge at trial.

Miller-El alleges that the state habeas review process was unreasonable because: (1) the state habeas court merely rubberstamped the findings of fact drafted by the assistant district attorney; (2) the court's findings did not mention by name his expert witness' affidavit; and (3) the court did not hold a "live" evidentiary hearing. These reasons, however, are insufficient given the unpersuasiveness of Miller-El's expert affidavit and in light of the probative evidence contained in the record indicating competency.

On habeas review, Miller-El centered his argument for a showing of incompetency around the affidavit testimony of Dr. Ari Kiev, psychiatrist and lawyer, who boldly concluded:

> . . . [B]ecause of the depressive effects of a prosthesis such as a colostomy, which reduces the recipient's ability to deal with stress, his physical debilitation and a depressive reaction secondary to his injury and circumstances, which produces apathy and lethargy, [Miller-El] had given up and resigned himself to his fate, and was not showing any of the self protectiveness and survival instincts which would otherwise be normal under the circumstances. As such, it is my opinion, in terms of reasonable medical certainty, that Mr. Miller El would have exhibited such a level of passivity and willingness to go along with whatever was offered that it amounted to an expression of a suicidal intent to end his life . . . .

See Affidavit of Ari Kiev, M.D. at 5.

This is contrary to the trial judge's observation that Miller-El "participated actively" with his attorneys throughout his trial. 3 SR 1197-98. Significantly, Dr. Kiev's affidavit does not state that Miller-El did not have the ability to consult with his lawyers with a reasonable degree of rational understanding. *See* Affidavit of Ari Kiev, M.D. Also, Dr. Kiev's affidavit does not state that Miller-El did not have a rational and factual understanding of the proceedings against him. *See id.* At best, Dr. Kiev's affidavit merely states that due to his weakened physical condition, Miller-El had a reduced capacity to participate "to the best of his normal abilities." *See id.* at 4.

Notably, throughout his appeal process, and despite voluminous documentation of Miller-El's surgical procedures and graphic detail about his subsequent physical ailments,

Miller-El has said little directly linking the standard for determining competency under *Pate*[7] and *Dusky* with Miller-El's physical problems. *Pate* merely asks whether the defendant has the ability to consult with his attorneys and understand the proceedings against him. It was reasonable for the state judge to conclude, based on the evidence before him, that Miller-El's physical discomfort was not probative of mental incompetence. As the federal Magistrate's Report noted, "Nothing in the trial record suggests that he lacked the capacity to understand the proceedings, consult with his lawyers, or assist in the preparation of his defense." Findings, p. 36. Moreover, the fact that the trial judge conscientiously exhibited regard for Miller-El's physical well-being by ensuring that Miller-El was physically fit to sit through trial is wholly independent of mental competency. Mental competency simply was not at issue.

Miller-El contrasts the competing expert affidavits presented by the parties without emphasizing the other evidence available to the reviewing judge in concluding that Miller-El was competent, including the supplemental briefing done by both sides and, most relevantly, the fact that the reviewing judge himself was the presiding judge at trial, who witnessed first-hand the demeanor and interaction of Miller-El with his attorneys at trial. Moreover, the fact that Miller-El himself along with his attorneys stated that he was competent on the record offers compelling evidence that Miller-El was, in fact, competent.

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[7] *Pate v. Robinson*, 86 S. Ct. 836 (1966).

Given the evidence before it and the review process undertaken, the state habeas court reasonably found that Miller-El was able to consult with his attorneys and was able to understand the nature of the proceedings against him.

C. The federal courts below properly applied 28 U.S.C. § 2254 to deny Miller-El relief.

Miller-El failed to demonstrate by clear and convincing evidence that his physical discomfort rendered him mentally incompetent to stand trial and, thus, the court below properly denied relief on his claim. Given that Miller-El's competency claims were fully-developed at state habeas review, the analysis progresses under sections 2254(e)(1) & (d)(2), which control how a federal court treats factual determinations made on the merits in state court.

In a habeas lawsuit, a state court's factual finding of competency is presumed correct. *See Maggio v. Fulford*, 462 U.S. 111, 117 (1983). The state habeas court expressly concluded that Miller-El was competent, finding that, "during all stages of his capital murder trial, [Miller-El] had the capacity to understand the nature and object of the proceedings against him, [and that] he consulted with counsel, and he assisted in preparing his defense." 1 FF 6, ¶ 17. Moreover, the state habeas court entered the following determination based on all the evidence before it that Miller-El "had the present ability at trial to consult with his lawyer with a reasonable degree of rational understanding and that he had a rational as well as factual understanding of the proceedings against him." *Id.* at 7, ¶ 18. Additionally, based upon the State expert's affidavit, the court found that Miller-El was competent both on and

off his pain medication. *Id.* at ¶ 19. Furthermore, the court found that no evidence existed of Miller-El's alleged incompetency at the time of trial, and that Miller-El actively assisted in his defense. *Id.* at ¶ 20. These findings were echoed by the Court of Criminal Appeals when it adopted the habeas court's findings, and are more than adequate to justify the state court's findings that Miller-El was competent in fact to stand trial.

Although the state court did not discuss the expert affidavit offered by Miller-El during collateral review, that fact does not overcome the presumption of correctness afforded the factual findings under section 2254(e)(1). By denying relief, the court implicitly rejected Dr. Kiev's affidavit, and the presumption of correctness also applies to implicit findings. *Marshall v. Lonberger*, 459 U.S. 422 (1983). Because everyone present at trial, including the judge, Miller-El, the defense attorneys for Miller-El, and the prosecuting attorneys have all at some point in time expressly stated that Miller-El was competent in fact at trial, it was reasonable for the courts below to defer to the state courts' factual determinations on this issue. Additionally, under section 2254, it was not error for the federal district court to conclude that the state court's decision was reasonable.

IV. The Fifth Circuit's Treatment of 28 U.S.C. §§ 2254(d)(2) & (e)(1) in Miller-El's Case is a Proper Application of the Statute.

In his attempt to avoid execution, Miller-El procedurally attacks the Fifth Circuit Court of Appeals' application of 28 U.S.C. §§ 2254(d)(2) & (e)(1) to his *Batson* and competency claims. Specifically, Miller-El alleges that the court below created an insurmountable presumption of correctness by requiring him to demonstrate

unreasonableness by clear and convincing evidence. To be exact, the court below stated:

> As an appellate court reviewing a federal habeas petition, we are required by § 2254(d)(2) to presume the state court findings correct unless we determine that the findings result in a decision which is unreasonable in light of the evidence presented. And the unreasonableness, if any, must be established by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

Miller-El v. Johnson, 261 F.3d 445 (5th Cir. 2001).

But, because the state court decisions on both Miller-El's *Batson* and competency claims were documented with abundant probative evidence, they were entirely correct and Miller-El is not entitled to relief regardless of section 2254's filter.

Additionally, the Fifth Circuit's approach was correct and mandated by logic. Labeling the court's construction as "extraordinarily deferential"and "extravagantly generous" to the state courts, Miller-El alleges that the court "effectively insulate[s] state factfindings from federal review." Yet, in a case such as Miller-El's where the sole issue on review involves a single, disputed, outcome-determinative finding of fact—The prosecution did not discriminate and Miller-El was competent in fact—the Fifth Circuit's construction was logically correct and proper.

A finding of unreasonableness is an absolute prerequisite to federal habeas relief on a state court determination of fact. 28 U.S.C. § 2254(d)(2). And while it is possible for a state court determination to be reasonable despite an incorrect finding of fact, the converse is not true in a case involving a single, outcome-determinative finding of fact. In other words, a case may not be found to be *un*reasonable if the sole outcome-determinative fact

issue is correct; only an incorrect fact can make a state court determination unreasonable.

Because a state court fact finding is presumed correct until clear and convincing evidence shows otherwise, it follows that a state court finding cannot be unreasonable until clear and convincing evidence proves the underlying fact incorrect. Therefore, the Fifth Circuit was legally and logically correct in holding that Miller-El must prove unreasonableness by establishing clear and convincing evidence.

Miller-El's case is the perfect illustration of this logic. For instance, in his *Batson* claim, Miller-El alleged that the prosecution improperly discriminated by exercising peremptory strikes against blacks at voir dire. The state court applied *Batson's* three step evidentiary formulation. At step three, the state court determined that the prosecution's reasons were credible and made the factual determination that the prosecution did not impermissibly discriminate. This factual determination is the sole issue Miller-El challenges here on this claim. And under section 2254(e)(1), this determination is presumed correct.

After careful review of the record, the federal courts below determined that Miller-El failed to overcome this presumption by clear and convincing evidence since the state court's step three reasons are supported by the record with probative evidence. Thus, the factual determination remained presumptively correct and, hence, not unreasonable.

The same analysis applies to Miller-El's competency claim. At state habeas review, Miller-El challenged his competency to stand trial. The state habeas court found that Miller-El was competent in fact at the time of his trial, which is solely a question of fact. The Court

of Criminal Appeals upheld this factual finding in light of the supporting evidence. On federal habeas review, this finding of fact is presumed correct under section 2254(e)(1).

In the federal courts below, Miller-El re-alleged that he was incompetent to stand trial. The reasonableness of the state court's finding of competency was solely dependant on this question of fact. Since the federal courts' independent review of the record echoed the state courts' finding, the courts below found that Miller-El failed to present clear and convincing evidence to overcome the presumptively correct competency determination. Hence, the state court determination was not unreasonable.

Miller-El argues that the Fifth Circuit's approach does not accord independent significance to sections 2254(d)(2) & (e)(1). But this is incorrect. Assuming arguendo that the federal reviewing courts found the state court competency or *Batson* determinations to be clearly erroneous under section 2254(e)(1), that would not end the analysis. They would still need to address the reasonableness of the state court determinations under section 2254(d)(2) in order to grant or deny habeas relief. This point in the analysis is where section 2254(d)(2) adds independent significance to the overall statute.

In this case, since only one factual determination was at issue in each claim, the courts below did not need to progress to this second tier analysis given that Miller-El failed to demonstrate that the state court finding was clearly erroneous as determined by the federal courts' review of the record. In Miller-El's case, it would have been imprudent and illogical to independently address whether a correct fact is reasonable. Contrast the Fifth Circuit's

recent statement in *Valdez v. Cockrell*, ___ F.3d ___, 2001 WL 1530153, at *7 n.17 (5th Cir. Dec. 3, 2001), stating:

> [A] district court may find by clear and convincing evidence that the state court erred with respect to a particular finding of fact, thus rebutting the presumption of correctness with respect to that fact. See § 2254(e)(1). It is then a separate question whether the state court's determination of facts was unreasonable in light of the evidence presented in the state court proceeding. See § 2254(d)(2). Thus, it is possible that, while the state court erred with respect to one factual finding under § 2254(e)(1), its determination of facts resulting in its decision in the case was reasonable under § 2254(d)(2).

Id.

Here, no tension exists between the section 2254(e)(1) and section 2254(d)(2) inquiries since there are not multiple factual questions at issue. Miller-El cites to cases in other jurisdictions discussing the interplay between sections 2254(d)(2) & (e)(1) in his attempt to prevent his execution. But any real or apparent tension existing in the lower federal courts' harmonization between the two statutory provisions is not at issue here. This is not the case to resolve that question.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that this Court deny Miller-El's petition for writ of certiorari.

Respectfully submitted,

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

CERTIFICATE OF SERVICE

I, Jim Marcus, hereby certify that true and correct copies of Petitioner-Appellant's Petition for Writ of Certiorari and Petitioner-Appellant's Appendices to the Petition for Writ of Certiorari were served on counsel for Respondent-Appellee on this 11th day of December 2001, via First Class United States Mail, addressed to:

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Austin, Texas 78701

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APPENDIX "A"

Transcript of the trial court's *Batson* remand hearing.

69677

NO. F85-78668-NL

THE STATE OF TEXAS	I	IN CRIMINAL DISTRICT COURT
VERSUS	I	NO. 5 DALLAS COUNTY, TEXAS
THOMAS JOE MILLER-EL	I	APRIL TERM, A.D., 1988

* * * * * * * * * * * * * * *

HEARING

VOLUME I OF I VOLUME

* * * * * * * * * * * * * * *

FILED IN
COURT OF CRIMINAL APPEALS
JUN 29 1989
Thomas Lowe, Clerk

APPEARANCES:

HON. JOHN VANCE
Criminal District Attorney
Dallas County, Texas

BY: HON. JEFF KECK
and
MS. SHARON BATJER
Assistant District Attorneys

APPEARING FOR THE STATE

HON. ROYCE WEST
and
HON. BRUCE CUNNINGHAM
Attorneys at Law
Dallas, Texas

APPEARING FOR THE DEFENDANT

BE IT REMEMBERED, to-wit: That on the 10th day of May, A.D., 1988, the above styled and numbered cause came on to be heard before The Honorable Pat McDowell, Judge of Criminal District Court No. 5 of Dallas County, Texas, and the following is a true, correct and complete transcript of all the proceedings had:

P R O C E E D I N G S

THE COURT: Let me call, for the record, F85-78668-NL, The State of Texas versus Thomas Joe Miller-El. Let the record reflect these events: This case is a case in which the jury, having answered affirmatively to special issues after the Defendant was found guilty of the offense of capital murder -- this case has been appealed to the Court of Criminal Appeals, State of Texas. I understand that briefs have been submitted and oral argument has been made. The Court of Criminal Appeals ordered this trial court to conduct a hearing which I will characterize as a Batson hearing. That is the purpose and thrust of this hearing this morning.

Are both sides ready on that?

MR. KECK: The State is ready, Your Honor.

MR. CUNNINGHAM: The defense is ready, Your Honor. Your Honor, at this time we would invoke the rule and ask that the witnesses who expect to testify be excluded.

THE COURT: Who will the State's witnesses be, Mr. Keck?

MR. KECK: We have secured the presence of both Mr. Macaluso and Mr. Nelson, Your Honor. I believe we will call Mr. Macaluso to testify briefly and we may then call Mr. Nelson.

THE COURT: In an abundance of caution, I will honor that. I'm not sure it applies in this case. These are both officers of the court, but neither one of them now is a Dallas County prosecutor so technically they're not any better than any other witness. They're just witnesses.

Mr. Cunningham, you're standing preparatory to doing something. I'm going to interpret this as a full-blown Batson hearing. By that I mean, I think I am going to insist that the defense make a showing, at least a prima facie showing, that discrimination was invoked in the State's striking of certain jurors just so, if nothing else, we will have an entire whole record. We thought, frankly, for the record, that we were doing it properly during the voir dire of the capital murder case. I felt that this Court's determination of certain objections made by the defense during that time resolved the issue of my finding on discrimination, but in view of the later cases and the Court of Criminal Appeal's particular order, I'm going to place the burden back on you-all to at least make a prima facie showing that Batson has been violated.

MR. CUNNINGHAM: Your Honor, on behalf of the defense at this time we would ask the Court to take judicial notice that Thomas Joe Miller-El is a member of the negro black Afro-American race.

THE COURT: I don't think there is any dispute

about that, is there, Mr. Keck?

MR. KECK: No, Your Honor. We will stipulate to that.

THE COURT: The Court will do that.

MR. CUNNINGHAM: Secondly, in support of our prima facie case, we would advise the Court or would show to the Court that Roderick R. Bozeman, prospective juror number seven, was a black male and was struck on February 5th of 1986, and was the first strike of the State.

Secondly, that Billy Jean Fields, a black male, was the State's preemptory strike number one and Bozeman was preemptory strike number -- Bozeman was preemptory strike number one and Billy Jean Fields was preemptory strike number two by the State. He was juror number nine. Joe A. Warren, a black male, was struck by the State preemptorily and he was strike number six. He was number twenty-eight on the prospective juror list; that Edwin L. Rand was a black male, that he was struck by the State, that he was the State's preemptory strike number seven and he is thirty-seven on the prospective jury panel list; that Carol S. Bogges, a black female, was struck by the State of Texas and that was the State's preemptory strike number eight and she is number forty on the jury list; that Wayne A. Kennedy, a black male, was struck by the State. He was the State's preemptory strike number nine and he is number

forty-three on the jury list.

Linda C. Baker, a black female, was struck by the State and she was the State's preemptory strike number ten and she was number seventy-one on the jury list. Mrs. Janice Mackey, a black female, was struck by the State and she was preemptory strike number twelve and she is juror number one hundred on the jury list.

Mr. Paul Bailey, a black male, was struck by the State and he was preemptory strike number thirteen. He is number one hundred and two on the jury list.

Finally, Mrs. Anna L. Keaton, a black female, was struck by the State and she was preemptory strike number fourteen. She is number one hundred and five on the list.

The State of Texas, between February 5th of 1986 and March 6th of 1986, exercised fourteen of its preemptory strikes; that ten of those fourteen preemptory strikes used by the State were used to strike either a black male or a black female.

Further, in support of Defendant's prima facie case, we at this time would offer all the evidence beginning on March 12th, 1986 that was offered with respect to its motion to quash and/or suppress the jury panel and/or to strike the jury panel including the testimony of the witnesses John Sparling; Jack Hampton, Judge of the

283rd Judicial District Court; Honorable Larry Baraka, Judge of Criminal District Court Number Two; Honorable Ralph Tate who, at that time was chief public defender; Mr. Norman Kinne, first assistant district attorney of Dallas County, Texas; Mr. Paul Macaluso; the Honorable Harold K. Entz who, at that time, was County Criminal Court Number Four and is presently judge of the 194th Judicial Court; the Honorable Ed. Kincaide who, at that time, was judge of the 194th Judicial District Court and is presently on the Court of Appeals district sitting in Dallas Texas; John Stauffer.

We would also, in support of our prima facie case, offer Defendant's Exhibits Numbers Four, Five, Six, and Seven which were offered during the motion to quash the jury panel because of the systematic exclusion of black minorities and the motion to suppress which the Court overruled and denied and exception was taken thereto. We ask that all the testimony and exhibits that were offered during that hearing be introduced for the purposes of establishing our prima facie case.

We would therefore suggest to the Court that Defendant Thomas Joe Miller-El -- may I have a minute, Your Honor?

THE COURT: Surely.

MR. CUNNINGHAM: Your Honor, could we have a

ruling on the offer of testimony and the offer of proof, Defendant's Exhibits Four, Five, Six and Seven?

THE COURT: Mr. Keck, what is the State's position?

MR. KECK: Well, Judge --

MR. CUNNINGHAM: And the testimony.

THE COURT: Is that on the motion to quash that we heard pretrial?

MR. CUNNINGHAM: Yes, sir. This hearing was conducted after we had completed the jury selection process.

MR. KECK: Judge, we would object to the Court considering any of that evidence. Unless we are mistaken, and we're confident that Mr. Cunningham and Mr. West will correct us if we're wrong, all of that evidence, the testimony of those listed individuals beginning with Justice Farling and also those exhibits, that all went to establishing past racially-based exclusion of minorities in Dallas County. We don't, incidentally, feel that it established that historical fact. The Court recalls that testimony, I guess, but the point is, Batson itself is directed at the prosecutor's conduct in the instant case.

It would be our position, even if every one of these people had testified no black had ever served in Dallas County in the past, that testimony, however

historically and accurate it might be, would be irrelevant to the Court's inquiry of the instant case. The reason that we can inquire when it is appropriate to inquire into the prosecutor's reasoning in the instant case was, as I'm sure the Court recalls, in Batson the Supreme Court said that this historical approach was too difficult for defendants to meet, that it was impossible for them to amass the statistical kind of evidence needed to come up to a Swain versus Alabama type of showing and that's why that evidentiary method was jettisoned by the Supreme Court of the United States.

It is not my position, necessarily, that one can no longer make out a Sixth Amendment claim by showing that kind of historical record, but it is my contention that type of historical record has no bearing on a Batson hearing and this case was remanded to this court exclusively for a Batson hearing. At this time there is absolutely no reason for this Court to consider what may have happened in any case tried in the past in Dallas County or, for that matter, any case tried in the future after this case was tried. All those things are irrelevant and even if they could show no black ever served before or since, in order to get a Batson remedy, they're going to have to show that in this case we struck jurors based on racial motives. If they can't do that, they will lose this

hearing.

MR. CUNNINGHAM: Your Honor, in response to that, Defendant's Exhibit Number Seven was a list of the ten black jurors that were actually struck in this case. That's what one of our exhibits was, Defendant's Exhibit Number Seven. Defendant's Exhibit Number Four was the Dallas Morning News for March 9, 1986, which had information in there about the selection process. Defendant's Exhibit Number Five was the Dallas Morning News for March 10, 1986 and Defendant's Exhibit Number Six was the Dallas Morning News article on March 11th, 1986.

We would further say that Batson clearly says that the defendant may rely upon any other relevant circumstances which raises an inference that the prosecutor used the selection practice to exclude the venireman from the jury on account of their race. That is what we suggest. That motion, our motion to quash the jury, which was held after the jury selection process in this case, because of the systematic exclusion of black minorities, we can rely upon those relevant circumstances. We can further rely upon the facts as to which there can be no dispute that preemptory challenges constitute a jury selection process that permits those to discriminate who are of a mind to discriminate.

THE COURT: Mr. Keck, again, I'm going to

overrule the State's objection to that evidence being before the Court, this Court, on this hearing. What weight, if any, I will give it, I certainly reserve for myself. Just so that the record is whole and the Court of Criminal Appeals wishes -- it has got it already in front of it, I assume. That material went down. Particularly the hearing on the motion to quash the panel went down with the record, I'm sure, did it not?

MR. KECK: Yes, Your Honor.

THE COURT: Of course, the record is clear that I denied your motion to quash the panel at the end of that hearing, so I've already made a determination there. Again, in an abundance of caution, I will admit the evidence. Whether or not I will give it any weight is another question.

MR. KECK: Your Honor, if that concludes the stipulations offered by --

MR. CUNNINGHAM: I think at this point is where the Court decides whether or not we have made our prima facie case. We would ask the Court to rule as to whether or not we have made our prima facie case.

THE COURT: Mr. Keck, do you want to argue on that point?

MR. KECK: Yes, Your Honor. I believe that in a typical Batson situation that might very well be true.

However, here the Court has the benefit of not only now having read the Batson opinion and Keaton and some of these other cases decided by the Court of Criminal Appeals, but it also has the advantage of knowing, I guess, because we have already been through one hearing on this topic, of essentially what is going to be produced.

Specifically, the Court knows that, while the State exercised fourteen preemptory challenges, it had fifteen preemptory challenges. The Court knows that one black served on this jury and that had continued to it from that, that had the state of mind to exclude blacks, that it certainly could have excluded the one black who did serve on the jury.

The Court also knows that the racial composition of the jury consisted of members of other minority races. Finally, the Court knows that the Defendant agreed to the excuse of six members of the black race in exchange for the State, I presume, to excuse other veniremen. We think the Court should consider the ultimate composition of the jury because it knows what that is now and we think the Court should also consider the fact that the Defendant agreed to the excuse of these six black veniremen when it decides -- I mean, I take it the thrust of the Defendant's complaint is I was tried by a jury on which there was only one black person. Part of that is -- part of our point would be, the

reason there is only one black person was because you agreed to excuse six black people. Now, that's not the only reason, the only factor. There is also the State's exercising its preemptory challenge.

We would suggest that all of the relevant circumstances, just as Mr. Cunningham has said, all of the relevant circumstances surrounding the case, can be considered by the Court when it makes its determination of whether or not there is a prima facie case. We would suggest that those facts also ought to be considered. We are not suggesting that the explanation should be considered at this point. We would agree that that is -- you know, in the typical course of a Batson hearing, that is not the way it would proceed. But these other factors relevant to the racial composition of some of these other groups we feel is before the Court and ought to be considered by the Court.

MR. CUNNINGHAM: Your Honor, in response to that, Batson clearly points out the facts that you may have one black. That is not the issue. The issue is whether or not the Defendant has -- well, whether or not there has been a discriminatory selection process. That is our contention with respect to the ten that they used preemptory strikes on. It becomes even clearer, when the Court looks at the number of strikes that were actually

used, fourteen, and then see that out of that fourteen ten were black. To say that there was a black, there was a Philippino, there was a Mexican, and there were two or three women that answers the problem, is not the answer because all the State could do is say, okay. we're going to see which one we want and put him on there and that kills this Batson hearing. That is not Batson. They have to clearly show a specific reason for their use of preemptory strikes on each and every one of the minority, in this case black. The fact that they had one on there don't make any difference. I think that is Batson clearly.

MR. KECK: Judge, I'm not saying that just because a black served on the jury that answers the Court's inquiry. I'm not saying that, but I am asserting that is a factor that this Court can consider along with the fact that we had remaining preemptory challenges to exercise against that black venireman, so we have a situation in which blacks and other minorities served on the jury. To the extent that the State had unutilized preemptory challenges, it could have excluded all blacks from the jury. Now, it got some help from the Defendant's agreeing to excuse six other veniremen, but I'm just saying those are all factors that the Court should consider in determining whether these facts and circumstances raise an inference that the State exercised the preemptory

challenges that it did exercise against blacks based -- you know, by virtue of a racially motivated reason.

THE COURT: Mr. Keck, I'm going to resolve this this way again maybe just because I'm extra cautious, because I think the Batson rule is still being expanded by the Court of Criminal Appeals. Keaton is the closest we've come to having a clear pattern of what to do. I'm going to ask and direct the State to go forward with an explanation of its strikes.

I will ultimately, of course, make the determination as to whether a prima facie case was even established or, if it was, whether or not the State's reasons were racially neutral and then, depending on what I do there, anything else if I go that far. But I think a whole record is the thrust of the Court of Criminal Appeals' order.

I do note, unless you lawyers object -- I kept notes during the voir dire myself and you mentioned six blacks were apparently excused by agreement. My notes indicate those were jurors seventeen, thirty, fifty, sixty-one, sixty-seven and eighty.

MR. CUNNINGHAM: What were they again?

THE COURT: I will give you the numbers. I have juror number seventeen, Mr. Gitchaway; number thirty, Mr. Randal; number fifty, Ms. Miller; number sixty-one, Mr.

Moseley; number sixty-seven, Ms. Collier; and number eighty, Mr. Tarry. Those are by agreement.

The record also probably needs to reflect from my same notes that in excess of sixty jurors out of a hundred and eight who were voir dired were excused by agreement. To go further, my understanding was, some of which is probably not on the record, by giving the various questionnaires to all the jurors, counsel on both sides, under the direction and instance of the Court, encouraged the lawyers to try to agree to excuse jurors who would like to be struck for cause or excused for cause if they were actually voir dired. I think both sides worked toward that end and only voir dired those jurors who appeared to be potentially seated jurors. For whatever value that is, I do not know.

At any rate, Mr. Keck, I would ask and direct the State to go forward with its explanation of striking those ten particular jurors. In doing so, I will say that I certainly will consider in making whatever rule I make in this case all of the voir dire including the composition of the jury, the agreements to excuse. I'm going to rely on my own recollection which might be refreshed by my own notes of various jurors and anything else that is before me. I want this to be a complete record.

Off the record, Pam.

(Whereupon, an off-the-record discussion was held between counsel and the Court.)

THE COURT: Back on the record. Mr. Keck, do you want to go forward?

DIRECT EXAMINATION OF PAUL MACALUSO

BY MR. KECK:

Q Would you State your name, please?

A Paul Macaluso.

Q Would you tell the Court how you are employed, please?

A I'm an assistant United States attorney for the Northern District of Texas.

Q How long have you been so employed?

A Since the first of the year, basically.

Q That is 1988?

A Yes.

Q How were you employed prior to that?

A I was an assistant district attorney for Dallas County, Texas.

Q How long were you employed in that capacity?

A From February of 1973 until the first of this year, 1988.

Q Let me ask you if you are familiar with the case which has resulted in this retrospective Batson hearing, that case being the State of Texas versus Thomas Joe

Miller-El, Cause Number F85-78668-NL?

A Yes.

Q And did you have anything to do with the prosecution of that case?

A Yes.

Q Would you state for the record, please, what your duties in that regard were?

A I was one of three, basically three, assistant district attorneys assigned by the district attorney to prosecute that case.

Q I see. Who were the other assistant district attorneys?

A Mr. Norman Kinne was the lead attorney on the case, myself, and Jim Nelson.

Q Directing your attention to the voir dire examination, was Mr. Kinne present during that voir dire examination?

A Occasionally.

Q Was there any particular problem that he had; was he just preparing for trial or --

A I am assuming he was interviewing witnesses and he had other responsibilities as well. The voir dire, as I recall, took several weeks.

Q Was that kind of part of the game plan, that you-all -- that you and Mr. Nelson would concentrate on the

voir dire and Mr. Kinne would then be lead counsel during the trial of the merits?

A That is correct.

Q From time to time did you, however, consult with Mr. Kinne about the exercise of certain of the State's preemptory challenges?

A Occasionally.

Q Not very often?

A Correct.

Q That would be rare, in fact, that you would do that?

A Pretty rare.

Q Let me direct your attention to -- well, I'm sorry. Let me go over a couple of more general matters.

As you and Mr. Nelson were interviewing the jurors through the voir dire process, let me first ask you whether or not there were jury questionnaires utilized in this case?

A Yes, there were.

Q Those were written forms?

A Yes, sir.

Q And they were passed out to the jurors prior to the time they appeared to be individually examined?

A Yes, I believe in every instance, virtually every instance.

Q And copies have been made of those of the answers that they had written onto the forms and then those copies have been provided to attorneys for both parties and to the Court?

A Yes.

Q Let me ask you if you had an occasion this morning to review the rather large box containing the district attorney's trial files concerning this case?

A Yes.

Q Were you able to find the State's copies of the juror questionnaires in that box?

A Some.

Q Were you able to find any of the questionnaires relating to the jurors who were preemptorily challenged?

A No, sir.

Q Did the forms that you have relate to the jurors who, in fact, served -- or the veniremen who, in fact, became jurors on the jury?

A Yes, that's correct.

Q When you and Mr. Nelson were devoting your attentions to this process, who between you was the senior attorney assigned to the case to represent the State?

A I was.

Q Prior to this trial, how many capital penalty juries have you selected yourself or participated in the

selection of?

A I don't know for sure, but I --

Q Just a rough guess.

A Ten maybe, maybe more, maybe less.

Q How many had Mr. Nelson selected, if you know?

A I don't believe he had done any. This was his first.

Q So you kind of took the lead?

A More or less.

Q Let me ask you: Did you ever come to a point in deciding whether or not to exercise a State's preemptory challenge, that you and Mr. Nelson disagreed about whether or not a preemptory challenge should be exercised against a particular venireman?

A Not that I can recall.

Q If such an eventuality had occurred who, between you and Mr. Nelson, would have been able to make the decision on behalf of the State of Texas?

A In all probability I would have.

Q And possibly you might have consulted with Mr. Kinne in a close situation?

A That's possible, yes.

Q All right. Let me direct your attention then to venireman number one O two. That's Mr. Paul Bailey. I believe yesterday afternoon after the Court had instructed

its coordinator to call me and inform me that we were having the hearing on this matter this morning, you and I met outside the federal courthouse and I gave you a copy of the court reporter's transcription of the voir dire of Mr. Paul Bailey; is that correct?

A Yes, sir, that's correct.

Q It was in a plain brown envelope which I see you brought with you to the witness stand?

A As you see it, yes.

Q I would like to direct your attention, if I could, to page 4167 of that document.

THE COURT: What juror was that?

MR. KECK: This is Paul Bailey, Your Honor, number one O two. This is one of the venireman where no explanation was actually given in the record.

THE COURT: We're assuming that I'm going to review the voir dire record for explanations plus anything else I hear at this hearing?

MR. KECK: Your Honor, as to the explanations which we are giving, as to the eight black men for whom explanations appear, it is my intention to ask the Court simply to take judicial knowledge of those things. I have asked Mr. Nelson to come in simply so that he can be here for any questions the Court might want to ask him about those reasons. If the Court pleases I can have Mr. Nelson

read those reasons into the record.

THE COURT: They are in front of me. I've already reviewed them preparatory to the hearing today. I will be glad, of course, to hear anything else you want to say but, if we can focus on what we have to have, it would be better for everybody.

Q (By Mr. Keck) Now, have you found that passage in your copy of the statement of facts?

A I've found page 4167.

Q All right. Would you --

MR. CUNNINGHAM: Could we take a minute, Your Honor -- could we get your copy back there?

THE COURT: Sure.

(Whereupon, there was a short break, after which the following proceedings were held.)

THE COURT: Let's get back on the record. Mr. West was excused because he had a matter that he had a conflict with and Mr. Cunningham has, of course, no problem with continuing the hearing.

MR. CUNNINGHAM: None whatsoever, Your Honor.

THE COURT: Go ahead, Mr. Keck. I think when I interrupted you-all, Mr. Macaluso was just about to be asked about his reasons for challenging Juror Bailey.

Q (By Mr. Keck) Mr. Macaluso, early on in your

examination of Mr. Bailey, you had begun questioning him about his beliefs about the death penalty and he had indicated certain religious or personal reservations about imposing the death penalty. You had, in fact, challenged Mr. Bailey based on Witherspoon versus Illinois and Wainright versus versus Witt; is that basically correct?

A Yes.

Q Defense counsel examined Mr. Bailey on this point and finally on page -- the page that is directing your attention, the Court even indicated on line twenty-two and twenty-three on page 4167 -- could you read that to the Court just to remind the Court of what was said?

THE COURT: Do you have the record now?

MR. CUNNINGHAM: No, sir. I will use his when he finishes.

Q (By Mr. Keck) Page 4167, beginning with line twenty-one, really.

A "THE COURT: I'll give you-all a few minutes. It's a good question that has been raised." Then parenthetically, "(Whereupon, there was an off the record discussion between counsel and the Court, after which the following proceedings were held.)" "THE COURT: Mr. Macaluso, I'm going to hold that he is qualified. I respectfully disagree with the State on it." It just says, "MR. MACALUSO: Judge, in light of the Court's ruling and

in light of the statements made by the Court, we'll use a preemptory challenge."

Q Now, let me ask you, Mr. Macaluso, at that point the Court had overruled this Witherspoon challenge after having indicated that the Court at least felt it was a good or a close question and at the point that you exercised the preemptory challenge, let me ask you why you did that as to Mr. Bailey?

A From the record, which I have reviewed, it became obvious -- I'm just rereading the record -- from the very beginning that Mr. Bailey had expressed religious, moral, and personal views in opposition to the death penalty. I thought he was very explicit about that. I felt at the beginning of the examination, throughout the examination, and at the end of my examination that's how he felt even though he did change his position somewhere after he was examined by Mr. Cunningham. I just felt that he would not be able to fulfill his responsibilities as a juror in light of any evidence and I exercised a preemptory challenge.

Q In any event, he wasn't, in your view, an ideal State's juror by any stretch of the imagination?

A Definitely not.

Q Because of these reservations he had about the imposition of the death penalty?

MR. CUNNINGHAM: Judge, object to counsel leading.

THE COURT: Don't lead.

Q (By Mr. Keck) Let me direct your attention then to -- I'm sorry. Did the race of Mr. Bailey play any role whatsoever in your decision to exercise a preemptory challenge?

A None whatsoever.

Q If anyone, regardless of race, had given similar answers to his, is it your testimony that you would have utilized a preemptory challenge on such a venireman?

A Without question.

Q Even if it was your last preemptory challenge? I know it wasn't in this case, but --

A No, it wasn't. I have never been in that position but, yes, I would have to say -- I guess I'm speculating to a degree but, yes, I would have had to given his statements in opposition to the death penalty.

Q Now, directing your attention to Venireman Joe Warren, which was the other venireman that I provided you a copy of that voir dire --

MR. KECK: Your Honor, this is the other venireman for whom no explanation was given.

THE COURT: What number was --

MR. KECK: He was number twenty-eight, Your

Honor.

Q (By Mr. Keck) Now, Mr. Macaluso, Mr. Cunningham has already stipulated that this was juror number twenty-eight and that this was the State's number six preemptory challenge; in other words, the sixth preemptory challenge exercised by the State in toto on Mr. Warren. Would you describe that as early or late in the voir dire process?

A I would describe it basically as early.

Q Would you state for the Judge -- I'm sure he is probably familiar but also for the record and the Court of Criminal Appeals. Would you just briefly detail perhaps how your philosophy about exercising strikes changes as we go through the voir dire process from early voir dire to late voir dire, if there is a change?

A Sure. Naturally I prefer to think that I was being conscientious and careful throughout a serious process such as this. I think it is inevitable that early on when you're starting off, of course, examining prospective jurors and you have fifteen strikes that you have the, I don't know if you could call it, luxury for lack of a better phrase or word of using strikes and being extra careful, I suppose.

I'm sure, if I were to go back and examine strikes that I exercised early on in voir dire, I might have found -- in fact, I have had judges kind of kid me

about exercising a strike on somebody who, I later said, I wish I had that strike back later on because you never know what kind of a venire person you're going to encounter later on in the examination.

In answer to your question partially, yes, you're probably more likely to use a strike early on on somebody and you would obviously come down to having used twelve or thirteen. It is just more precious, I guess, is a way of putting it.

Q Of course, the other fact is, you're counting jurors who have actually been selected, too?

A Sure. I left that out. Of course, obviously if you have used twelve or thirteen strikes and you have eleven jurors, that's one thing. If you have used nine or eight strikes and you have two jurors, it is quite a bit different. There is a ratio, I suppose, of the number of strikes you have remaining to the number of jurors you need to complete the jury.

Q Now, directing your attention back to Mr. Warren, just to we understand, in light of that explanation that you just gave, Mr. Warren's -- the decision on Mr. Warren came at a point in which you probably weren't being extra careful --

A Yes.

Q -- for lack of a better word?

A I guess you could say that.

Q Because you still had nine preemptory challenges left even after exercising against Warren?

A I don't recall exactly where in the voir dire examination this particular venire person fell. Assuming that the pages are numbered such -- this page is in the low fifteen hundreds and Mr. Bailey was number forty-one hundred, so there would be some significant distance before Mr. Bailey.

Q Mr. Bailey, just to refresh your memory, was juror number a hundred and two. Mr. Warren was juror number twenty-eight. I realize that they were probably not all called exactly in order, but --

A No, and some jurors were excused.

Q Twenty-eight might be even called before twenty-seven?

A Rignt.

Q Would you state for the Court your reasons for ultimately exercising a preemptory challenge against Venireman Warren?

A I have had a chance to review what appears to be about forty pages of my examination of Mr. Warren and the examination by Mr. Cunningham, I believe. I have noted a few things that tends to refresh my memory with regard to our decision in this case. I'm looking at page -- for

example, on page 1543 at the bottom there at line twenty-three where he was asked by me, "I gather you feel pretty strongly about murder, do you not? I mean, it goes without saying?" His answer was, "Well, it's just like I said, you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, you know, involved with it if I had a choice, but as far as the case, you know, if I feel that you can avoid it, you know, I think you should."

He had some answers there, and I've got some other pages marked, that made references to -- I thought they were inconsistent responses. At one point he says, you know, on a case-by-case basis and at another point he said, well, I think -- I got the impression, at least, that he suggested that the death penalty was an easy way out, that they should be made to suffer more. Again, I don't have the benefit of the questionnaire itself. Frequently we have information on there that kind of guides us on some of the questions we ask.

He goes on in, I believe, some of the examination by Mr. Cunningham -- and I imagine this would be on the questionnaire, if it were filled out. He makes reference to a brother, I believe, who had been recently convicted. By the way, the section I was referring to just a moment ago about these unusual feelings he had about whether someone is really being punished by the death

penalty or not and ambivalent to -- on page 1532 basically lines nine through seventeen.

Q Could you just read those, Mr. Macaluso, so we could all be reminded of them?

A I assume I'm asking about what the death penalty accomplishes and the question before that was, "What do you think it accomplishes when you feel it does?"

Answer, "I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment."

Back to what I was referring to about -- and I believe it is in response to some questions by Mr. Cunningham on page 1556. On line four there is a reference to apparently something that had happened to the venire person's son. There is a question beginning on line four, a question by Mr. Cunningham, "This mishap that your son was involved in, was that Bengy or Joe, Jr.?" Answer, "That was Joe, Jr." Question, "Did anything happen as a result of that that might affect your decision if chosen as a juror in this case, sir?" "No."

It goes on, question, "That was something at

school?" "Yes, it was." I don't recall in reading my examination of Mr. Warren any mention in particular was made of that initially. I don't know how the time ran on that, but I gather there was something on the questionnaire. I don't have the questionnaire before me nor have I had a chance to see it before I testified here.

At the bottom of page 1556 beginning with line twenty-four, actually line twenty-two, question, "Was your brother-in-law a victim of a crime in Las Vegas?" Answer, "My brother. Yes." "Okay. What type of crime was it?" Answer, "I don't know the details of it, sir. He had to make restitution of some money. It involved some food stamps or something, but I don't know all the details of it. He was convicted and got a probated sentence. He had to make restitution of some money."

Question, "How long ago was that, sir?" Answer, "That was about a year and a half or two ago."

Those are the basic reasons. Without the benefit of the questionnaire, we just felt that he -- you know, at that juncture and at that point in the voir dire examination with nine strikes remaining, we thought it would be best to exercise a preemptory challenge. We did not think he would be a favorable juror for the State.

Q Let me ask you the same question that I asked you about Mr. Bailey, if this particular venireman, that is

Mr. Warren, had presented himself at a time in which you have one more challenge to exercise, one more preemptory challenge, would you have been as likely to think about utilizing it?

A No, I would not have.

Q Also, part of it was just at this point in voir dire Mr. Warren gave his answers and he was not as clearly disfavorable to the State as Mr. Bailey?

A That's correct.

Q And I think you have indicated that Mr. Bailey was, in your judgment, pretty -- about as unfavorable as one could get?

A To the point that we submitted him for cause.

Q With regard to Mr. Warren, did the race of this venireman play any role whatsoever in your decision to exercise a State's preemptory challenge against him?

A No.

MR. KECK: Your Honor, we will pass the witness.

THE COURT: Mr. Cunningham, do you wish to cross-examine?

MR. CUNNINGHAM: Yes.

MR. KECK: Your Honor, could the record reflect that I have tendered to Mr. Cunningham the State's copies of the transcript of the voir dire of both Mr. Warren and Mr. Bailey. He has those available to him for cross-

examination or whatever purpose he would like to use them.

THE COURT: Mr. Cunningham, do you need any time to look through those?

MR. CUNNINGHAM: My understanding is that the Court is going to review those?

THE COURT: Correct. Before I decide anything in this case, I will would like the opportunity to reread the testimony myself at least of these two jurors and probably all of the jurors that were challenged.

MR. CUNNINGHAM: Just so the record will reflect, they were submitted to counsel for the Defendant while the hearing was in process.

CROSS-EXAMINATION OF MR. MACALUSO

BY MR. CUNNINGHAM:

Q Mr. Macaluso, did I understand you to say that the reason why you may exercise a preemptory challenge early in the selection process may differ when you have used a large number of your preemptory challenges?

A That's correct.

Q So that you start out in the beginning and your selecting process in the beginning -- for example in this case beginning on February 5, 1986, when you struck Mr. Bozeman and when you struck Mr. Bailey on March 5, 1986, Mr. Bozeman being number one and Mr. Bailey being with thirteen strikes, your reason for striking Bozeman vis a

vis Bailey is different?

A That would largely be true. The same considerations are made but I -- that largely would be true.

Q So that the more strikes you use and the least number that you have affects how you look at a prospective juror and particularly a black juror as the process goes on?

A No, not with regard to a black juror in that consideration or any other color juror, for that matter. Something else is left out. It is just not the number of strikes. As Mr. Keck pointed out, it is the number of jurors that remain to be seated. I can recall, for example, a situation in this particular case where I can recall vividly one of the persons who was on this jury, I will be honest with you, I would have struck him. If he had been in Mr. Warren's position, I would have struck him faster, if there is such a thing, than I did Mr. Warren.

Q You said what?

A I can recall there was a juror on this case that I would have -- that we accepted. I think he was either the eleventh -- I believe he was the eleventh juror, maybe the tenth juror. I can't recall which, but way on in the process, that I would have --

Q I can't hear you for that door. Now, you were

saying?

A I was saying that I can recall specifically -- I can recall two people that I probably would have struck if they had appeared in the array earlier on, say, if they had switched places and been number twenty-eight where Mr. Warren was. I can recall two individuals that, if I had them occur then, I would have struck them. It occurred later on when we had more seats to fill, we had fewer strikes, and I had to take a chance on them.

Q Were these people that you are talking about actually selected?

A Yes, sir.

Q One of them was a Philippino?

A No.

Q One a Spanish sir name?

A He had a Spanish sir name.

Q So the other one was a black?

A No. It was a white female.

Q Was that juror number twelve?

A I think we're thinking about the same person.

THE COURT: Juror number one O eight, I believe.

Q (By Mr. Cunningham) Ms. Sandra Hearne?

A Nothing personal against either of those jurors, I might add.

Q You did not strike Ms. Sandra Hearne, juror

number one O eight?

A If she was the last juror seated, that's the one.

Q She was the last juror seated.

A Right.

Q And was seated when you had one strike left; is that correct?

A I would have to take your word for it. I'm not denying that it probably is accurate. I think she was the last juror seated. I think we did have one strike left.

MR. CUNNINGHAM: That's all, Your Honor.

THE COURT: Is that all, Mr. Keck? I just have one question that may already have been asked, but why don't you go ahead and finish. I just have a couple of questions which you may have asked and I just didn't hear them.

REDIRECT EXAMINATION OF MR. MACALUSO

BY MR. KECK:

Q Mr. Macaluso, just so we understand, as voir dire progresses, I didn't understand you to say that your feelings about any particular venireman changed. In other words, you like them or dislike them just as much as you would have, but your reluctance or eagerness to exercise a preemptory challenge against this sort of marginal venireman, that may change as the voir dire progresses and

you have used more of your challenges?

A That would be true. A large part of it or at least a substantial part of it is that as things begin to wind down, as you get eight, nine or ten jurors, you can better calculate obviously. You know how many people you need and how many strikes you have left. You can look down the list of people that you have questionnaires, which we examine, and we can make some judgment calls on people we feel would be better suited towards the case in our opinion. We can better estimate how many strikes we're going to need and take those into consideration and some of the strategies that come into play, I'm sure, on both sides in that regard in using strikes at that time. It is much more difficult to do early on in the voir dire.

MR. KECK: Thank you.

RECROSS-EXAMINATION OF MR. MACALUSO

BY MR. CUNNINGHAM:

Q Mr. Warren did not say anything that indicated to you that he would be unfair to the State?

A Well, he didn't say in so many words, no, but I have to go just from my review of his examination on the basis of some of his answers and some of his positions and the other information about his having some family members who had either been convicted of crimes or were on probation or whatever, that I felt he would be more biased

towards the Defendant in the case.

MR. CUNNINGHAM: That's all, Your Honor.

EXAMINATION OF MR. MACALUSO

BY THE COURT:

Q Mr. Macaluso, you have testified to your strategy in selecting the jurors in a capital murder case. And you have participated in voir dire in capital murder selections; is that correct?

A In others?

Q Yes.

A Yes.

Q Can you give me any number?

A How many all total?

Q A ball park figure.

A Maybe fifteen -- not as of that time. Maybe ten at that time.

Q This may not be relevant, but maybe it ought to be in the record. I believe our manner of doing voir dire was to bring up fifty jurors each Monday, to qualify fifty, and then commence to conduct voir dire through that list and then at the end of the week quit and bring up fifty new ones on Monday. Is that how we did this case? Did I recall it correctly?

A Yes.

Q Which again may or may not affect the strategy

of either side in exercising their strikes; in other words, not knowing what is going to come the next Monday?

A I don't recollect there was a special venire in this case.

MR. CUNNINGHAM: There was not a special venire. In fact, we started with a brand new panel the following Monday.

A I do recall now that I believe Mr. Nelson and I would alternate with Mr. West when making shuffles, I believe, down in the central jury room on the various Mondays.

Q I recall many shuffles. That's why I asked that question.

MR. CUNNINGHAM: There was a shuffle each Monday.

THE COURT: That's all I have.

MR. CUNNINGHAM: This is also true, I think, that if there were ten, eleven, or whatever the number was, that were not reached when we broke on Friday, every one after that number was excused from service.

THE COURT: I think that is true.

MR. CUNNINGHAM: And then on Monday we started the process all over again with a brand new panel.

MR. KECK: Your Honor, before Mr. Macaluso is excused I should mention that, in fairness to Mr.

Cunningham, I intend as to Venireman Bozeman, venireman number seven, to ask the Court to take judicial notice of the explanation that was given for the exercise of the State's preemptory challenge against Mr. Bozeman. That explanation was given by Mr. Macaluso and it appears in volume number one, really, of the voir dire, which is page 323 and 324, according to my records.

THE COURT: You have set that same matter out in your motion for rehearimg your brief. Is that what you are referring to?

MR. KECK: Yes, Your Honor.

THE COURT: I have that in front of me.

MR. KECK: I mention it only so that perhaps we can excuse Mr. Macaluso. I did mention it in the brief, but I have the reason here -- it may be that Mr. Cunningham would like some opportunity to cross-examine Mr. Macaluso on that reason before he leave the stand. Mr. Nelson provided the State's reasons for the exercising of the State's challenge as to the other seven veniremen. He is also available to be cross-examined. I just thought we might give Mr. Cunningham that opportunity now.

MR. CUNNINGHAM: Your Honor, if I had wanted one, I would have used --

THE COURT: Beg your pardon?

MR. CUNNINGHAM: As far as I am concerned, Mr.

Macaluso can be excused if the State has no further questions they want to ask him. The defense has asked him all the questions they want.

THE COURT: Anything else, Mr. Keck?

MR. KECK: No, Your Honor.

THE COURT: Mr. Macaluso, you can be excused. Thank you, sir.

Mr. Keck, does the State have any additional evidence it wants the Court to consider on the hearing?

MR. KECK: Not at this time, Your Honor, other than the fact that we would like the Court to take judicial notice of all of the explanations for the other eight veniremen. Those are set forth in our motion, but you might want to write down -- I'm not sure that it says as to all of them the specific place in the record.

Now, the State and the appellant used a numbering system for the -- because of the edition of the transcript, there may have been two transcripts or a preliminary hearing that was also reported, but the numbers that I have used in my brief do not correspond to the numbers of the voir dire. For example, the volume number ten of the voir dire, we refer to in our brief as R-12. In other words, there are two more added onto it. There are references in my motion that reflect the two plus, if you will, system of indicating the volume of the transcription.

As to Anna Keaton, the explanation provided by Mr. Nelson to the Court is found at volume thirteen, page 4373.

MR. CUNNINGHAM: Wait a minute. Volume thirteen, page what?

MR. KECK: Page 4373.

THE COURT: That is the numbering system that is in the Court of Criminal Appeals'; is that correct?

MR. KECK: Yes, Your Honor. If you went back and looked at these volumes, it would appear to be like volume eleven, Volume XI.

MR. CUNNINGHAM: Where do you get thirteen?

MR. KECK: Well, we call this R-13 because, you know, R-1, our transcript -- I think maybe there were two transcripts or maybe there was some preliminary hearing even before voir dire that was really R-2. See, what I'm getting at is, it says ten but really we both called it R-12. On the cover of it, it says volume ten of voir dire.

With regard to venireman Mackey, the explanation is found at Roman numeral thirteen, 4374. I believe also at that page, the Court itself recognizes that it can see that Juror Matthews is not an ideal juror although the challenge for cause is overruled by the Court.

We've already gone over Juror Bozeman. With regards to Venireman Fields, that explanation is found at

page 450 of the first volume of the voir dire. That's R-3. Again, that explanation was provided by Mr. Nelson. I think that explanation is perhaps reiterated in the State's motion that the Court has been provided with.

With regard to Venireman Rand, that explanation by the State is found at Roman numeral six at 1855 and 1856. I believe that is also set forth in our motion, Judge. The voir dire of Venireman Rand begins at 1805, Your Honor.

With regards to Venireman Bogges, number forty, the explanation given by the prosecutor, again that was Mr. Nelson in giving the explanation, is at Roman numeral six, 2043.

With regard to Venireman Kennedy, Mr. Nelson's explanation appears at our Roman number seven dash 2939 through 2940 and I believe that is also reproduced in our brief, Your Honor.

The final explained venireman that Mr. Nelson provided explanations at volume ten, page 3017 through 3018.

We would ask the Court to take judicial notice of all those explanations and we would submit that they were given at a time that the prosecutors had both discussed the matter and reflected the contemporary reason before this case has been remanded. I would also like the

record to reflect that I know the Court whenever it recesses has seen Mr. Nelson and Mr. Nelson has been in the witness room and he is ready to be cross-examined on any of these reasons by Mr. Cunningham if that is his desire. I don't think it would serve the State's purpose or interest to examine him seeing as the reasons are all in the record and available for the Court's consideration.

THE COURT: Thank you, Mr. Keck. Mr. Cunningham, I will give you a chance to reply to any of that, if you wish, but are both sides prepared to close evidence now?

MR. CUNNINGHAM: Yes.

MR. KECK: Yes, Your Honor.

THE COURT: I'm going to, of course, reread the voir dire of the ten challenged jurors. I did read some of it already after you filed your earlier motion with the Court of Criminal Appeals. I found what I read consistent with your summary and your motion, so I don't suspect that it is not accurate.

Do you-all wish to make argument on this at this point in time? I don't know if this is particularly a fact-finding hearing as I understand the Court of Criminal Appeals' mandate, but I certainly think there is a position that one side or the other can take.

MR. KECK: Your Honor, I would just submit to

the Court that the Court itself -- and you might also want to make a note of this: At page our Roman numeral fourteen dash twenty-two, the Court found that on every strike where the defense asked for an explanation, the State has provided satisfactorily to the Court it as not being racially motivated. That was before Batson came down, before anything that maybe challenges or changes the way the Court is thinking about things. I think that is an important finding. As to those eight veniremen, black veniremen, who were preemptorily challenged by the State, this Court at the time the matter was fresh in its mind felt that the prosecutor's explanations satisfied the Court that they were not racially related reasons.

In Keaton versus State -- now, this is the last Keaton, Keaton number three, the one that was decided on April 6th, 1988. I know the Court has read this. On page eight and nine, the Court of Criminal Appeals in Keaton refers to these five factors which will weigh heavily against the legitimacy of any explanation which is offered by the prosecutors. Those factors are, first, that an explanation based on group bias where the group trait did not show to apply to the challenged juror specifically. I would submit to the Court that there has been absolutely no indication that any of the explanations are subject to this first factor.

Second, that no examination or a perfunctory examination of the challenged juror. Again, I would submit that the Court can see that all of these black veniremen were examined extensively. This isn't a situation where the State just asked a few questions of the black veniremen and then struck them. The implication of that, of course, would be, well, we were going to strike them all along because they were black. That certainly didn't happen in this case.

The third factor, just for an examination of the challenged juror, i.e., questioning a challenged venire person so as to evoke a certain response without asking the same question of other panel members. Here there probably were certain questions that were asked of certain of these black veniremen who were challenged by the State that were not asked of all the veniremen. But to the extent that that occurred, the State would suggest that -- for example, Mr. Bailey, he had indicated on his form, and it is clear through the whole context of his voir dire, that he had his opposition to the death penalty.

Of course, the white and other nonwhite veniremen who didn't make those responses, they weren't questioned about them as thoroughly -- or their feelings about the death penalty as thoroughly as the jurors who did indicate a reservation about imposing the death penalty.

Our point would be, to the extent that there was a just for examination, it can be explained by nonrace-related factors. Probably in most cases, the jurors answered these questions that the prosecutors testified they relied on.

The fourth factor, the reason given for the challenge is unrelated to the facts of the case. I think there is none of these situations where it can really truly be said that the reasons given were not somehow related to the facts of the case.

Finally, this is for a treatment where there is no difference between the responses given in an unchallenged venire person. At no time has the Defendant urged that there are unchallenged venire persons who did not have these same traits that the prosecutors testified either at trial or in this hearing that they relied on in exercising the State's preemptory challenges.

We urge the Court to conclude that there is no reason to discount the explanations given by the prosecutors at this hearing or at the time they were called upon to give explanations at trial. For that reason, the Defendant has failed to show that the explanations, which were given by the prosecutors, were incorrect or should not be accepted by the Court. The State has gone forward with its burden of producing evidence and the Defendant has failed to sustain his burden of proof on the issue of the

racial-related reasons. For that reason, we think this Court should find that none of the State's preemptory challenges were exercised for a racially-related motive.

THE COURT: Mr. Cunningham, do you want to reply to that?

MR. CUNNINGHAM: Not at this time, Your Honor. We may at a later date after we review the record and also, hopefully, by the time we have an opportunity to review the facts of this particular hearing -- then we may ask the Court to let us present oral argument, but it would be after we get -- after we have an opportunity to review the record voir dire of these ten and also look at the hearing today as the Court is going to do.

MR. KECK: Would the Court prefer to have some sort of proposed findings of fact?

THE COURT: Mr. Cunningham, without prejudging the case, I'm going to find at this point, based on what I've heard today and my recollection of it all, to agree with Mr. Keck's position, but with this qualification: I want the same benefit of everything that you've talked about and that is to review the records myself. I'm going to ask Mr. Keck though, in anticipation of this hearing that we're going to have, to prepare some proposed findings and conclusions so that he can furnish the defense a copy, of course, and I will have those in front of me at the time

that we have our hearing.

MR. KECK: It may be useful to have Mr. Cunningham prepare findings also and then you will have both of them.

MR. CUNNINGHAM: If you want me to, I will prepare findings establishing a prima facie case. You can then prepare yours where you say there are specific reasons with respect to the ten and we would ask for a few days after his reasons for the ten so maybe we could have some counter findings of facts.

THE COURT: Mr. Keck, can you get your proposed findings in by next Monday? Is that too soon in view of the fact the record we had here today won't be -- or is that too soon?

MR. KECK: I need a couple of days after the record is --

THE COURT: Off the record.

(Whereupon, the proceedings in this cause were concluded.)

STATE OF TEXAS I

COUNTY OF DALLAS I

I, PAMELA SMITH, Official Court Reporter in and for Criminal District Court No. 5 of Dallas County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings directed to be included in the statement of facts in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

Witness my hand, this the 16th day of May, A.D., 1988.

PAM SMITH,
OFFICIAL COURT REPORTER
Certification No. of Reporter: 112
Date of Expiration of
Current Certification: 12-31-88

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APPENDIX "B"

Review of the Ten Challenged *Batson* Veniremembers
(As excerpted from the Director's Response in
Opposition to Certificate of Appealability).

REVIEW OF THE TEN CHALLENGED *BATSON* VENIREMEMBERS
(As excerpted from the Director's Response in Opposition to Certificate of Appealability).

The record demonstrates that each *Batson* juror was challenged based on reasons directly related to their in-court responses. As reflected by the voir dire proceedings, the state court fact-findings are clearly reasonable in light of the evidence before the court.

I. The Peremptory Strikes Were Permissible Because They Were Race-Neutral, Specific, and Supported by the Record.

Ten *Batson* jurors were peremptorily challenged by the State.[1] In Miller-El's instant Application for COA, he addresses the peremptory challenge of six of the ten *Batson* jurors. A summary of the six peremptory strikes and the State's race-neutral reasons follows:

- **Roderick R. Bozeman [No. 7]**

Mr. Bozeman was the first African-American juror questioned. The State justified this prospective juror's exclusion on the race-neutral basis of this juror's hesitation in imposing the death penalty and the State's concerns about this juror's views on rehabilitation. 1 VD 280-82.

Under questioning by the prosecution, Mr. Bozeman classified himself as the type of person who believes in the death penalty as a general proposition, but who wouldn't want to be the person on the jury who would actually make the decision. 1 VD 282. Mr. Bozeman also expressed his belief that the death penalty was not proper for a person capable of being rehabilitated, but equivocally stated that he didn't think that his views on rehabilitation would affect his ability to serve as a juror. 1 VD 298. Critically relevant in a peremptory situation, and entirely missing from Miller-El's discussion of this juror, Mr. Bozeman further stated, that even if the special issues clearly could be answered beyond a reasonable doubt in a way that a death sentence would be the result, he might refuse to answer the questions honestly in order to avoid imposing the death penalty if he personally felt like the defendant should not be executed. 1 VD 301. Subsequently, the State exercised a peremptory challenge on Mr. Bozeman.

Upon the State's challenge, the defense offered for the record the fact that Mr. Bozeman was the first black juror questioned, suggesting that Mr. Bozeman was challenged on the basis of race. 1 VD 322. In light of the defense's observation, the court asked the State whether Mr. Bozeman was excused for reasons other than race. 1 VD 323. The prosecution responded:

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[1] The original venire consisted of 108 persons. 1 Tr 9. Of these,18 were black. Of the 18 blacks, six were excused by the agreement of the parties, leaving 12 potential black jurors. Out of the 12, one black veniremember, Ms. Virginia Smith, was stricken for cause after the trial court found that her views on the death penalty would prevent or substantially impair her ability to serve as a juror. Another, Troy L. Woods, was empaneled on the petit jury. This left 10 black jurors who eventually were peremptorily excused.

> I would state without hesitation or reservation that [the excusal] is not [on account of race], Your Honor. Although not required to, I would state at this time that I have reservations and I'm exercising a preemptory [sic] challenge in this particular situation because of the general answers of . . . Mr. Bozeman, and specifically with regard to his feelings on the death penalty, his feelings and his position with regard to rehabilitative aspects of an individual charged with this sort of crime, his obvious hesitation, which is on the record, with regard to being able to override his personal feelings with regard to somebody receiving a life sentence, and that he also said earlier that he felt the prior pattern of conduct would not necessarily be enough to convince him that a person was worthy or entitled to a death sentence, and other matters.

1 VD 323-24.

These reasons offered by the prosecution were clearly-articulated, race-neutral, and trial-related. Additionally, they were supported by the record, not patently pretextual, and they were specific. Thus, the court was reasonable in finding that there was no *Batson* violation here.

- **Billy Jean Fields [No. 9]**

The prosecution challenged Mr. Fields for two explicitly race-neutral reasons. First, the prosecution was concerned about Mr. Fields' willingness to impose the death penalty given his deeply-religious belief in the rehabilitative capacity of all persons. Second, the State was concerned about the fact that Mr. Fields' brother was convicted several times and served time on a possession of a controlled substance charge. 1 VD 435-36. Miller-El argues that these grounds were pretextual, and he

makes several juror comparisons to support his claim. As the Magistrate's report in the court below indicated, however, "[a] comparison between jurors is not probative unless they are similarly situated." *See* Findings and Recommendation of the United States Magistrate Judge, p. 18 (citing *Hicks v. Johnson*, 186 F.3d 634, 637 (5th Cir. 1999), *United States v. Jimenez*, 77 F.3d 95, 100-01 (5th Cir. 1996)). *See also*, *U.S. v. Webster*, 162 F.3d 308, 350 (5th Cir. 1998) (holding that jurors are not similarly situated where there are different combinations of qualities).

During voir dire, Mr. Fields made the statement that when "an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated." 1 VD 424. In challenging this juror's dismissal as pretextual, Miller-El compares Mr. Fields' religious-based rehabilitation convictions with another juror's (Kevin Duke) feelings on rehabilitation. *See* App. for COA, pp. 59-60. The two views are distinguishable on moral versus legal, and absolute versus conditional, rehabilitative principles. While Mr. Fields' beliefs were solely grounded in the unconditional ability of the "word of God" to rehabilitate, Mr. Duke discussed rehabilitation in the conditional "*if* someone can change" context, emphasizing the parole board's role in assessing whether a convict was truly rehabilitated. *See* App. for COA, p. 59 (juror comparison). The two views are different. Mr. Fields was

dismissed because of concerns regarding his unconditional religious beliefs, while Mr. Duke lacked the same absolutist fervor.

Second, the prosecution cited Mr. Fields' brother's multiple convictions as grounds for concern in dismissing Mr. Fields. Miller-El argues, because the State did not challenge a white juror, Mr. Noad Vickery, whose sister was similarly convicted, that this indicates that Mr. Fields' excusal was clearly pretextual. *See* App. for COA, p. 63. There are differences, however, between the circumstances of the crimes, and the manner that they were answered by the two prospective jurors, that raise legitimate peremptory concerns regarding Mr. Fields' sincerity. For example, upon questioning by the prosecution, Mr. Fields testified that, although his brother was convicted "on a number of occasions," he did not "really know too much about it" despite the fact that the convictions were in Dallas. 1 VD 435-36. Contrast Mr. Vickery's more explanatory testimony, that his sister's conviction occurred in California when Mr. Vickery was a teenager, as his reason for not knowing all the details of her conviction. *See* App. for COA, p. 63. Moreover, the Fifth Circuit has held that jurors are not similarly situated where the jurors have different combinations of qualities. *Webster*, 162 F.3d at 350. Here, in his attempt to exhibit juror similarity, Miller-El draws character qualities from a compilation of different white jurors who collectively possessed related characteristics and circumstances to those of Mr.

Fields. This patchwork juror comparison does not suffice to establish pretextuality.

The state court's decision finding no *Batson* violation here was reasonable. Both reasons cited were race-neutral, specific, and supported by the record.

- **Joe A. Warren [No. 28]**

The prosecution gave a race-neutral response that Mr. Warren was excused due to inconsistencies in his responses concerning the death penalty. 1 BRH 30. Also, the prosecution appeared to be concerned about Mr. Warren's feelings that the death penalty might not serve a purpose, and whether he agreed with the death penalty in all cases. 3 VD 1526, 1532. The prosecution was possibly concerned about this juror's son who may have been involved in some criminal offense, and his brother who was a convicted felon. 1 BRH 31-32; 3 VD 1556; 1 PTH, Defense Ex. 7, Questionnaire of Joe Warren at 4; 1 Supp. Tr. 3. Finally, the prosecutor explained that the strike of this juror came at a time when the State had additional peremptory challenges which could be used to strike marginal jurors. 1 BRH 33. These reasons are clearly supported in the record, race-neutral, articulate, and specific. Furthermore, review of Mr. Warren's testimony reveals a morals-based mentality that is skeptical of the propriety of the written law.

Throughout his testimony, Mr. Warren continually imposed his own morals-based opinions in challenging the propriety of the law as written. For example, Mr.

Warren indicated a belief that the death penalty as administered is not sufficiently punitive and that executing murderers ensures that the killer is "not really suffering."[2] 3 VD 1532-33. Compare this response to juror Noad Vickery, about whom Miller-El exhausts several pages in his instant application in an attempt to analogize the two jurors. *See* App. for COA, pp. 67-71. The two jurors could not be more opposite. For example, in contrast to Mr. Warren's critical assessment about the death penalty, when Mr. Vickery was asked whether he had a personal feeling one way or the other about the death penalty, Vickery responded in a utilitarian, social context stating, "I guess the death penalty probably serves a purpose." 4 VD 1574.

Another example of Mr. Warren's skeptical approach to the law occurred when he was asked about his position on the death penalty. Mr. Warren stated, "My personal position on the death penalty, there are some cases where I would agree, you know, and there are others that I don't." These morals-based, value-laden statements

[2] Miller-El compares this retributive sentiment with juror Duke, who stated that "[t]he death penalty would be better to me than life in prison, because that is like dieing [sic] every day," and juror Jenkins who stated, "I think a harsher treatment is life imprisonment with no parole." 3 VD 1074. These two comments indicate a willingness to assess the death penalty for humane purposes, rather than Warren's "live and suffer" retributive, vindictive-centered approach. Whether these differences lead to a better or worse State's juror is not the point. The point being made is that, despite Miller-El's attempt to analogize certain jurors' testimony with the *Batson* jurors, related concepts do not imply that the compared jurors are "similarly-situated." Nor does it lead to a conclusion that one dismissal is pretextual when other jurors give similar content-related responses, because, often, it can be demonstrated that those responses come from philosophically-different stances that are relevant in a peremptory situation.

indicate some second-guessing as to the appropriateness of the law as written, and a possible hesitancy to follow the law as written. Contrast Warren's skepticism with the total legal deference and acceptance of the written law by juror Noad Vickery. When asked about his feelings on the death penalty, Mr. Vickery responded:

> The laws, as you explain it to me, are written and I agree that I would have to say yes to either three questions or whatever you said, but I still feel like that I don't write the law and I don't say where the Defendant gets the death penalty or not in one sense. I mean, the law says — whatever my decision is, then the law says what happens, not I.

4 VD 1571.

This testimony indicates a person who is completely willing to accept the law as written, without any personal, moral interjection. In his attempt to analogize the two jurors, Miller-El cites Mr. Vickery's testimony in answering a hypothetical question asking him to assume he is governor for a day and questioning whether he would abolish the death penalty. Here, Mr. Vickery, given the hypothetical authority to change the law, candidly stated he was not sure what he would do. This is in contrast, though, to his responses to questions directly pertaining to how he felt as a potential juror in a capital murder case. In the role of potential juror, Mr. Vickery stated that, despite a personal belief that a person should be spared, he would answer the special issues as the evidence warranted. 4 VD 1589. Notably, although Miller-El touts Mr. Vickery as being similarly situated with juror Warren, ***the defense***

exercised one of its peremptory strikes against Mr. Vickery.

Miller-El cites to many other jurors' testimonies regarding their beliefs on the death penalty without providing an overall context for each juror's testimony. But, it should be noted that in some of his examples, some jurors were specific on where they agreed or disagreed with the death penalty, unlike Mr. Warren's unforthcoming, blanket assessment. *See* App. for COA, p. 74 (comparing jurors Smale and Hearn who offered specific examples of where they did not feel the death penalty was appropriate).

Thus, while Miller-El uses snippets of testimony from other potential jurors in an attempt to equate them with Mr. Warren and the other *Batson* jurors, a broad, contextual review reveals moral, philosophical, and situational differences. In any case, given the evidence contained in the record, the court was not unreasonable in finding no *Batson* violation with respect to potential juror Warren due to his express, equivocal hesitation to follow the written law.

- **Edwin Rand [No. 37]**

The State justified its peremptory challenge of this juror by explaining that the juror was ambivalent about the death penalty. 4 VD 1855. As noted by the Court of Criminal Appeals, the juror responded "right now I say I can, but tomorrow I might not" when asked whether he could impose the death penalty. *Miller-El v. State*, Slip

op. at 12; 4 VD 1805. This constitutes a valid race-neutral justification for peremptorily excusing this juror.

- **Carrol Boggess [No. 40]**

The State exercised its peremptory challenge with respect to Ms. Boggess on the race-neutral justification that she was not sure whether she could assess death, and because of her continual reluctance to serve on this jury. 4 VD 2008, 2043. Furthermore, the State was concerned about the juror's prior testimony as a witness for her nephew, who was charged with theft. 4 VD 2043; PTH, Defense Ex. 7, Juror Questionnaire at 5.

Despite Miller-El's attempt to portray Ms. Boggess' hesitancy to administer a sentence of death as just an initial response that she later recanted, Ms. Boggess left the unmistakable impression throughout her voir dire that she was uncertain and hesitant about administering a death sentence. For instance, she first stated, "I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it." 4 VD 2008. Five pages of testimony later, she stated, "I'm not saying that I feel like I could impose the sentence myself — or I'm going to be imposing the sentence, is that correct?" 4 VD 2012. Two pages after that when asked whether she could vote for death, she stated, "I've never been in that situation. I don't feel like I would

want to be in that situation and whether I could do it or not, I'm not real sure." 4 VD 2014. Another two pages later, referring to an assessment of the death penalty as a "killing," Ms. Boggess stated, ". . . but now whether or not I could actually go through with murder — with killing another person or taking another person's life, I just don't know. I'd have trouble with that." 4 VD 2016. Seventeen pages of testimony later, Ms. Boggess continues asserting her hesitancy to impose a death sentence by stating that "the rule of the government should be a biblical rule and if the rules of government are not biblical, then I'm not supposed to follow that, but follow my own beliefs biblically." 4 VD 2033. And finally, on the next page of voir dire testimony, Ms. Boggess states, "The law has decided, now I'm supposed to follow the law, but only if the law states what is biblically right." 4 VD 2034.

For Miller-El to argue that Ms. Boggess only exhibited an initial hesitancy about administering a death sentence is misleading. Plus, even if Ms. Boggess interspersed occasional affirmations about answering the special issues, her testimony, at best, is equivocal. The prosecution was justified, on race-neutral grounds, in exercising a peremptory strike against this juror. More importantly, the court's decision finding Ms. Boggess' dismissal to be proper under *Batson* was reasonable because the grounds were supported by the record, clearly articulated, race-neutral, trial-related, and specific.

- **Wayman A. Kennedy [No. 43]**

The State clearly articulated its race-neutral justification that this juror believed that the death penalty should only be assessed in a mass murder situation. 5 VD 2176-2179. This constitutes a legitimate ground for peremptorily striking this juror. And the state court's determination finding no *Batson* violation here is reasonable.

Miller-El did not challenge the dismissals of the remaining four *Batson* jurors in his district court or instant petition.[3] While Miller-El goes to great lengths in an

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[3] Miller-El did not challenge the dismissals of the remaining four *Batson* jurors. But for the Court's information, a summary of the race-neutral reasons for their dismissals follows:

Linda C. Baker [No. 71]

The State's race-neutral justifications were that she did not believe in the death penalty and that she became antagonistic toward the prosecution during questioning. 8 VD 2990-91, 3018.

Janice Mackey [No. 100]

The State struck this juror because of her views on the death penalty and the fact that the juror indicated that she wanted no part of deciding whether the defendant should be executed. 10 VD 3949-3960, 4022. Even the trial court agreed that because this juror's beliefs against the death penalty were so strong, there was not even a "hint" that the State excused this juror due to race. 10 VD 4023. As the trial court observed, she was an "obviously very, very weak" juror for the State. 10 VD 4023.

Paul Bailey [No. 102]

The State exercised its peremptory challenge on this juror due to his "religious, moral, and personal views in opposition to the death penalty." BRH 25; Supp. Tr. 3. This juror was submitted for cause by the State, and the trial court held that the juror was qualified even though the trial court noted there was some question in his mind as to whether this juror indicated that he might answer the questions untruthfully so as to avoid imposing the death penalty. 11 VD 4158-59, 4167-68.

Anna L. Keaton [No. 105]

The State's race-neutral justifications were the fact that this juror was equivocal on her ability to give the death penalty, 11 VD 4319; 4326, and that because the juror's son had been involved with the criminal justice system, she would empathize with the defendant's mother, as indicated by her testimony that "he has a mother too." 11 VD 4323, 4329; 11 VD 4373.

attempt to prove unreasonableness, the record of the voir dire proceedings demonstrates that the prosecution exercised its strikes in a race-neutral manner. Because each race-neutral justification is supported by the record of the proceedings, Miller-El cannot prove the unreasonableness of the state court's findings. As stated in *Hernandez*, "where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." 500 U.S. at 369.